

MINUTES OF EVIDENCE

TAKEN BEFORE THE

ROYAL COMMISSION  
ON  
MARRIAGE AND DIVORCE

38-41

THIRTY-EIGHTH, THIRTY-NINTH, FORTIETH AND  
FORTY-FIRST DAYS

Wednesday, 28th January, 1953

Wednesday, 22nd April, 1953

Tuesday, 14th July, 1953

Tuesday, 7th December, 1954

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WITNESSES

PROFESSOR ALAN MONCRIEFF, C.B.E., M.D., F.R.C.P.

PROFESSOR SIR DAVID HENDERSON, M.B., Ch.B., M.D., F.R.F.P. & S. (Glasgow),  
F.R.C.P.E., F.R.C.P.

DR. I. R. C. BATCHELOR, M.B., M.R.C.P.E., D.P.M.

MR. W. E. LEICESTER, a member of the New Zealand Bar.

THE HON. MR. JUSTICE FINLAY, Judge of the Supreme Court, New Zealand.

MR. P. ALLEN, C.B., representing the Home Office and the Prison Commission.

MR. N. J. P. HUTCHISON, representing the Scottish Home Department.

THE REV. MARTIN W. PINKER } representing the Central After-Care Association.

MISS H. L. LONG }

MR. W. HEWITSON BROWN, O.B.E., representing the After-Care Council (Scotland).

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THE ROYAL COMMISSION ON MARRIAGE  
AND DIVORCE

THIRTY-EIGHTH DAY

Wednesday, 28th January, 1953

PRESENT

THE RT. HON. LORD MORTON OF HENRYTON, M.C. (*Chairman*)

MRS. MARGARET ALLEN  
DR. MAY BAIRD, B.Sc., M.B., Ch.B.  
MR. R. BLOE, M.A.  
LADY BRAGO  
SIR WALTER RUSSELL BRAIN, D.M., F.R.C.P.  
MR. G. C. P. BROWN, M.A.  
SIR FREDERICK BURROWS, G.C.S.I., G.C.I.E.  
MR. H. L. O. FLECKER, C.B.E., M.A.  
MRS. K. W. JONES-ROBERTS, O.B.E.  
THE HONOURABLE LORD KEITH

MR. F. G. LAWRENCE, Q.C.  
MR. D. MACE  
MR. H. H. MADDOCKS, M.C.  
THE HONOURABLE MR. JUSTICE PEARCE  
DR. VIOLET ROBERTSON, C.B.E., LL.D.  
SHERIFF J. WALKER, Q.C., M.A.  
MR. THOMAS YOUNG, C.B.E.

MRS. M. W. DENNERY, C.B.E. (*Secretary*)  
MR. A. T. F. OGILVIE (*Assistant Secretary*)  
MR. D. R. L. HOLLOWAY (*Assistant Secretary*)

EXAMINATION OF WITNESS

(PROFESSOR ALAN MONCRIEFF, C.B.E., M.D., F.R.C.P.; called and examined in private.)

937. (*Chairman*): Professor Alan Moncrieff, you have very kindly come to help us this morning. Will you first of all give us your qualifications and experience?—Thank you very much, Sir. First of all, may I thank you for letting me come? I am essentially here as an individual. Although I have talked to colleagues on this subject I cannot be said to be representing any body of opinion, although unofficially I think I do. I am a children's physician and have long been interested in the social side as well as in health problems, and I occupy the position of Nuffield Professor of Child Health. I have been for fifteen years Chairman of a moral welfare committee for children in Hampstead, and for the last three-and-a-half years Chairman of the Advisory Council in Child Care set up by the Home Office under the Children Act, 1948, which has had the task of working out various regulations and other things under the Act. Recently I have been made a justice of the peace for the London Juvenile Court Panel. In other words, I am interested in the general aspect of children as well as just in their health.

You gave me two main questions, which you asked me to try to answer for you. The first question was as to the effects of the broken home on children of parties who have been divorced or separated either by legal or *de facto* separation. I do not think anybody who works with children can avoid seeing sooner or later bad effects in many instances on children who have come from such homes. The child is frustrated, lacks security and affection, develops behaviour abnormalities, which may range from the sort of thing which brings them to hospital, like bed-wetting, nail biting, temper tantrums, to the much more serious things which bring them into contact with the criminal law, such as stealing and destructiveness; sometimes they come before the juvenile court charged with being beyond control. The difficulty is to substantiate this with satisfactory statistical material which would show that there is an increased tendency for this sort of behaviour to develop in children from broken homes. I tried to obtain this material with the help of my colleagues in the Great Ormond Street Hospital, which, over two years, had a case-load of 800 children in the psychological department, but we had to give it up. It was a very lengthy task and meant discussing each individual child, and we had no satisfactory control material with which we could compare our results. Consequently I cannot give you up-to-date statistics, but I want to quote two authorities which have not, according to the papers I have received, been

quoted before to you and which you might find helpful from the statistical point of view. One is thirty years old and the other is ten years old, but they are remarkably in agreement in what they find. The first is Cyril Burt's book, *The Young Delinquent*. I am quoting mostly from the second edition published in 1931. He was dealing particularly with the period after the first world war, when the social conditions were to some extent rather parallel with the conditions we have been experiencing over the past ten years. He was a psychologist and his experience was rather limited to the cases from juvenile courts in London. He used the phrase "defective family relationships", which really covers what nowadays in modern jargon is called "the broken home". He found that these defective family relationships were very frequently present in cases of juvenile delinquency, and he regarded this as an exaggerated form of a behaviour problem. I would say that nowadays to some extent it is a matter of luck whether a child goes to a juvenile court or to a guidance clinic, and I would lump the two things together, juvenile crime and behaviour problems. He found this defective family relationship occurred again and again in his study of the juvenile delinquent. He admitted that there were many factors concerned in delinquency and this was only one of them. What he did was to take a very large sample of boys and girls who had been before the court, and to compare their social background with that of an equal sample of children who had not been before the court. He compared the factor of defective family relationships in normal children with those who had been before the courts. In normal children the factor was found to be one in 500 instances, that is, .2 per cent., but in the children who had been before the court the factor was 9 per cent., approximately one in ten. His point then was that there was this enormous increase in the factor of broken homes or defective family relationships among the children who had been before the courts in London. He gives some fairly complicated tables of the actual findings in his book at page 64.

The most modern figures are from another book, also on the topic of juvenile crime; it is *Young Offenders* by Cav-Saunders, Mannheim and Rhodes, published in 1942. They made an enquiry into the factors concerned in the production of juvenile crime, and they extended their enquiry to the provinces. They wanted to assess what one could call normal family life and compare it with abnormal family life, to see whether this played any

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material part in the background of the juvenile delinquent, and I quote from this book, page 72:—

"It appears that the chance of a delinquent coming from a home with a disturbed home atmosphere is three or four times as great as the chance of a delinquent coming from a home with a normal atmosphere."

They analysed this disturbed home atmosphere in more detail, and they found that for every category, boys or girls, London or provinces, in cases where the father had gone away or the mother had deserted the percentage of delinquents was always greater than the percentage in the control cases. So that confirms very largely what Cyril Burt had suggested thirty years ago—that there is strong statistical evidence of an increase of broken homes, of defective family relationships—in the background of juvenile delinquents or children with behaviour problems.

Now that is essentially the answer to the first question, but there are two supplementary questions which I think arise from it and I would like to deal with them briefly. The first is this: is it inevitable that children will be upset by a broken home? Of course the answer to that must be, no. There are many children who can apparently stand an unhappy atmosphere, at any rate for the time being. They appear to be able to put up with a very poor, very bad, home situation, and to escape, at any rate for the time being, from the development of any serious symptoms. What appears to happen in many cases is that the trouble becomes rather more deep-seated, and results in disturbed behaviour much later on, in adolescence or young adult life. There appears to be evidence to show that in the background of adult disturbed behaviour there has been a grossly disturbed home in early life.

Then the second supplementary question is this: if a marriage is breaking up, is it perhaps not better for divorce or separation to take place so that the children may be released from the very unsatisfactory atmosphere in which they have been living? One can scarcely imagine anything worse than to live in an atmosphere where father and mother are quarrelling all the time, and it is sometimes said that it is better for such a marriage to break up to give the children relief from such an atmosphere. I think this is a rather dangerous question, firstly, because there is no guarantee whatever that if divorce then takes place the children will get such relief as is promised them. My experience is that they will go on to an even more insecure life where they are passed from pillar to post, from relative to relative, from school to school, and this suggestion that it is far better for the children for the divorce to go through because they will be happier afterwards is just not borne out, at any rate by my personal experience. Then, arising from that, surely from the children's point of view it is always best as far as one possibly can to leave them with their real parents? In other words, both parents should be with the children during their growing up process, and therefore if divorce or separation is threatened one should do everything in one's power to secure a reconciliation for the sake of the children. That, of course, leads on to the question as to the ways in which marriages can be saved by use of various people such as doctors, parish priests, marriage guidance counsellors, friends, relations and so forth.

One other point on this primary question is what are the numbers of children likely to be involved in divorce cases? It is very difficult to get figures that are satisfactory, but in 1947 some figures were published, although I cannot, I am sorry to say, find out how by whom. These figures did suggest that in that year 26,000 children in London had in fact been involved, so to speak, in divorce cases. At that time the total number of divorces was about 50,000 in the country as a whole, of which, I understand, about half were heard in London. That being so, it seems to me a fair assumption that an average of one child per divorce would give us a fair figure of the number of children who are in fact involved in the break-up of marriages by divorce. So that, with divorces running at 50,000 a year, it means that there are each year potentially 50,000 unhappy children, to put it at its lowest; 50,000 is about the population of a town like Bedford or Torquay, and represents just under half the number of the total children in care. It is really a very large number of unhappy children who are concerned in this problem.

The second main question was with regard to arrangements for custody of, and access to, children of divorced and separated parents. Here I must plead great ignorance of the law. I have never been in a divorce court in my life and I know very little about it. The Secretary very kindly sent me a summary of the evidence received on this question, and I find that many of the points I was going to make have in fact already been covered, and therefore I can be brief about them. It is very difficult to generalise on this matter because one keeps thinking of specific instances and specific cases, but I have put down in my notes four or five general principles which, I feel, should guide us in this matter. The first, I think, everyone would accept—that the welfare of the children must be a primary consideration. I think that that should be the guiding principle. Then the next principle would be this: that a decision as to custody and access should only be made after careful enquiry by a trained worker. I would draw attention here very strongly to the current practice in juvenile courts, where practically every case is remanded for a report because the court finds it just cannot reach a satisfactory decision, having regard to the welfare of the child, unless it has information on the medical, psychiatric, home and school history of the child before it. Each child in juvenile court work, and I would say equally in a divorce case, presents an individual problem. It is almost impossible to have rule of thumb methods of dealing with children. This question of requiring an enquiry in every instance by a trained worker is most important and it brings me to the question as to who should undertake such work. In my opinion it would probably be inadvisable to introduce a new body of welfare workers for the sole purpose of making enquiries in respect of the children of parties to divorce proceedings. It seems to me that there are two possible groups of people to be considered in this matter—one would be the probation officers who have special experience in juvenile court work, and the other might well be the children's officers of the Children's Committees set up under the Children Act. Those latter are growing in experience. They have to deal with deprived children; they have very much to deal with unhappy children from broken homes—broken in rather a different way, perhaps, than by divorce; after all, the child whose parents are divorced, or are contemplating divorce, is very much a child deprived of normal home life, the wording used in the Curtis Report and the Children Act.

The third principle is that a child, in order to grow up normally, must have basic affection and security, and it must be a continuing process. Therefore there is need not only for an enquiry at the time when arrangements are being discussed for the children, but there must be some form of continuing supervision so that one can see not only that the immediate arrangements are satisfactory but that they do not go wrong subsequently. Here again, I would suggest that supervision might well be exercised by the children's officer or by the probation officer with experience in children's work. It seems to me that this continuing supervision is particularly important when, for example, the parent who has been granted custody dies. Who is then in fact the legal guardian of the children? There is also the position when the parent re-marries. The immediate programme for the children might be quite satisfactory, but within a year there may often have been radical changes in the position of the children.

I am disturbed, and here I know I am on dangerous ground, about what appears to happen in what I think are called in non-legal circles "arranged" divorce cases. I am disturbed in connection with the case where one knows that to some extent the so-called guilty party has arranged the divorce, but because he—and it is generally the husband—is the guilty party, he is barred completely from having custody and very often barred, I understand, from access. It seems to me that enquiries as to the real situation as regards the children in this sort of case are not very thorough. In fact, the practice has only just begun in recent times of making enquiries about the children. It is in those cases that it seems to me there is a particular need not only for an enquiry at the time custody is awarded but for continuing supervision. One wonders whether such children should not, if there

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is no other way of doing it, come before the juvenile court as being in need of care or protection. It seems to me that in many cases that phrase describes exactly what these children need, and I would say that any such enquiry and supervision should be compulsory, not permissive. I understand that at the present moment it is permissive for a welfare officer in certain courts to make enquiries of the type I am mentioning, so that a proper plan can be made for the children. But I understand that that is not compulsory. It occurs, I believe, only in the London area at the moment, and has not been widely extended. It seems to me also—and this I take from the papers that you sent me—that in many cases the question of the custody of the children does not come before the court for discussion, because some arrangement has been made between the parents before the case gets to the court. These cases I would regard as particularly dangerous. It seems to me that the parents have made their own arrangements in a sort of bargaining way without any outside trained worker going into the question as to whether those arrangements are in fact the best in the interests of the child. I would have thought that it was important in all cases, including those in which the question of custody has not been mentioned, that there should be some enquiry at the time and that there should be some measure for continuing supervision.

Finally, I would like to make a general observation which seems to me to be relevant although perhaps not directly concerned with the child. As a result of working a lot amongst unhappy children, it has seemed to me that the greatest lack in that marriage is much too easy. In Cyril Burr's book, I came across a very apt quotation from Alexander Paterson, who was a great authority, in which he said, speaking of the London poor, "Marriage is the commonest of all juvenile offences", and it struck me that that summed up to some extent what I wanted to say. It seems to me much too easy for young folk to get married without any preparation whatever, and it is just those folk who seem to make in many instances the sort of marriage which comes unstuck and in which reconciliation seems to be a little bit late in arriving. One feels that the education of such people for marriage should have begun at a very much earlier stage. And broadly speaking, it seems to me fundamental, if one is to help the children, that marriage must become more difficult rather than that divorce should become more easy.

9138. Thank you very much. There are two questions I should like to put. First of all, I want to take the procedure with which I am familiar, with regard to wards of court, and to ask you whether you can make any suggestions as to that. In cases in the Chancery Division concerning wards of court, there has already been a separation and a contest has already arisen, as a rule, between the parents. The first thing the court addresses its mind to is what is best for the child. And it is with that in view that everything is done. First of all, we invite both the parties to put in their evidence on the subject in the form of affidavits. We do not by any means take it that the so-called guilty party should not have custody, especially in the case of a mother and a young girl, and we do not take it as a matter of course that access must be very limited. It depends on the circumstances. When the affidavit evidence has been given, which the judge can read, each party is at liberty to cross-examine the other party's witnesses and almost always lawyers are engaged in these cases. The cross-examination takes place before the judge who has charge of the matter. He makes up his mind what is best in the interests of the child. His order may be for custody to one with access to the other, it may be that access is limited, it may be in some cases (where the parents have fallen out but are both perfectly decent people), a matter of sharing the holidays. Once that has been done there is nothing further in the way of inspection. Any necessary inspection of the homes will have been done beforehand by the Official Solicitor. The parties are left to carry on, but the order is never a final one. It is made only until further order, and at any time either of the parties may apply to have it varied. But the arrangements having been made to the best of the judge's ability, we are inclined to think that it is rather a disturbing factor for

visitors to go to the homes and inspect from time to time. Now that is the general practice, as I know it, in that very limited class of case, and I would like to have your observations on that.—Obviously, with the very great care that is taken at the beginning, with the enquiries, affidavits and opportunities for cross-examination, it is almost certain that the plan made is a good plan; a great deal of trouble has been taken over it.

9139. "The best plan that is available" is all you can say, if the parents fall out.—There is such a good enquiry that the need for continuing supervision in those circumstances is less. It seems to me that the more trouble one takes at the beginning the more right one is going to be. I do not quite know what happens if circumstances alter materially in the case you have outlined. Suppose custody after this very careful enquiry has been given to the mother and the mother dies?

9140. In that case the father or the person with whom the child was living after the mother's death would bring the matter to the attention of the court.—It could come back to the court?

9141. Yes. If the person with whom the child was living did not bring it to the attention of the court, you may be quite sure the father would.—I would say that that type of enquiry and that type of order would satisfy me. The second point that you make, about whether it is a bad thing or a good thing to have inspectors going into homes and seeing how people are getting on, is, of course, a very fundamental one. The right of the individual to be free from "snoopers" and enquiries balanced against the right to happiness of the children is a very difficult philosophical question to settle. I was arguing the other day with the woman chairman of a committee, who said that she would not have people prying in her house even if the children were unhappy. She felt she had the right to make the children unhappy and it was nobody else's business. If there is physical cruelty, the National Society for the Prevention of Cruelty to Children will investigate; the bruises are there and there can be no question about it. The trouble is that one cannot see bruises on a child's mind. The question is at what stage should there be a right of investigation in cases of mental cruelty to the children.

9142. I see. I am not, I think, personally very much against "snoopers" if they are fulfilling a useful object. The only reason for my observation was that I do not want a child disturbed more than is necessary, once the best arrangements one can devise have been made for its welfare; and in the cases I have in mind, if the child is with one parent and anything is going wrong, the other parent will be by no means unwilling to bring it to the notice of the court. There is one other point—the question of preparation for marriage. That matter is, I am afraid, outside our terms of reference, but I cannot resist asking you one question on it. What would be the nature of the preparation or education for marriage of young people which you would suggest?—I would suggest that for adolescents there should be, very definitely as part of the educational system, classes in parenthood, in housework, in keeping a home together; I believe that if one begins with these material things, a great deal of the non-material considerations will follow. It seems to me that so often marriage begins to go wrong at the material level of lack of comfort, lack of effort, even bad cooking, bad management inside the household. I would therefore like to make a start with preparation for marriage at that level. If that could be combined with a sex education graded to ethical standards, one would then have some very definite preparation for marriage. The difficulty about sex education at present is that it is carried out purely on a scientific basis without any ethics attached to it at all. That may, in fact, be dangerous.

9143. Would you suggest that that preparation should be given at school or should there be some compulsory attendance at a later stage after the children have left school?—It is generally unsatisfactory to give it at school. They are too young, going through puberty, at a stage in their teens when it is unsatisfactory, and probably a very much better time is when they are seventeen or eighteen plus. I think I am right in saying that the general body of opinion is against such preparation being given in the schools to children under fifteen. With the compulsory attendance of young people for continuing their education

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after leaving school, it seems to me that there is an opportunity of adding these subjects. During the war, I understand, some of the most popular lectures to the people in the Services were on this subject of parentcraft and home-making. They were then at a stage when marriage was not too far away from them, grows up and independent, and it was at that stage they wanted the information.

9144. (Lord Keith): Are you familiar, Professor, with the extent of the work done by children's officers?—Under the Children's Committee? Yes, pretty well.

9145. Suppose there were 25,000 cases in England that had to be investigated in respect of custody of children—of course these would be spread over the whole country—do you think that would be a grave additional burden that would involve some increase in the staffing of the children's service?—I think it would involve some increase in staff, that is why I had put probation officers first—for this reason, that if one is right in saying that proper care of children from broken homes would diminish the number of juvenile delinquents, the extra work undertaken in the field of divorce would be balanced by a lessening of the amount of work in the juvenile court.

9146. You favour the probation service?—On the whole, yes, but I know how overworked the probation officer of a juvenile court is today. I know the number of children's officers is increasing and it may be that with a little extra help they could cope with it.

9147. I would have thought myself, from the little I know, that the probation service was more overworked than the children's service.—I would agree, but one is always hoping that the probation officer will have less work whereas the children's officer, I think, will have more work in the future.

9148. On the question of custody, we have heard a certain amount of evidence that where a parent has been given the custody of the child, it is often very bad and very disturbing that the other parent should have access. Now, what is your view on that?—It is difficult. It depends so much on what the access consists of. If, for example, the mother has the custody of a child and the father is allowed to see that child from time to time—if he merely meets little Johnny, takes him for a good feed, then to the pictures and then sends him home again, that seems to me to be an awfully futile business. If there is any real part to be played by a father in the bringing up of a child (and of course there is), he must take his share in helping the child to develop his character; therefore something more is wanted than a meal and a visit to the cinema. The child must see enough of the father in circumstances which permit of a real friendship developing and in which the child can discuss its problems with the father. The father should be able to take an interest in the child's educational and physical progress. That, it seems to me, can only be achieved by the father living with and getting to know the child. An arrangement of that sort ought not to be disturbed, provided that, if the father marries again, his new spouse is prepared to play the game with the child. Access does so often mean, however, a mere chance visit of the sort I have described, which is upsetting to the child.

9149. There is not only the chance visit that may be unsatisfactory as being of no real benefit to the child, but there are the other cases where access may be definitely disturbing to the child and very open to investigation—for instance, where the parent who has access tries to get the whole of the child's affection, making suggestions against the other parent. I have known cases where I would say that it really was bad for a parent, whether the mother or the father, to be allowed access at all.—I would agree.

9150. How are you going to decide whether access is going to be really bad for the child, or beneficial and therefore to be allowed, or of neutral value such as the case of taking Johnny to the pictures and giving him a good time?—What I had in mind when I pleaded for some form of continuing supervision was that, if it becomes obvious that the child is disturbed, the matter would be re-opened.

9151. It is a very difficult thing to investigate.—Very difficult, but the question does arise in other ways—for instance, when a juvenile court puts a child on probation

at home and then has to alter its decision and send him away after all because the parents prove to be a bad influence on that child.

9152. On the first branch of your statement, may it be that the factors that have caused broken homes in the parents' lives are just the factors that make for delinquency among the children? What I am thinking of is this: it may be that the parents are just bad, it may be heredity or it may be that they have been brought up in a bad environment and that their background makes for the broken home; then that very same background is re-transmitted to the children and causes juvenile delinquency. If you could improve the parents and the parents' outlook, then a great deal of the juvenile delinquency would disappear. Do not the same factors which operate in the case of the parents also operate in the case of the child?—I think that is very true. If one or both of the parents are very easily provoked into bad temper very likely the children will be also, and the home breaks up because of the constant tempers. It would be unfair to say the child was bad-tempered because the home has been broken up; there is the hereditary factor. I would absolutely agree that the way to tackle the problem is to get parents to try to cure themselves so that their children's hereditary tendency will be evened out a bit by their better environment.

9153. (Mr. Justice Pearce): You have referred to the barring of access to the guilty party in certain cases. In what you call "arranged" divorces, the guilty party, so-called, is, I should have thought I could go as far as saying, never barred by the court. The present practice is that the court will only bar a parent from access to a child if it thinks that the parent's influence is corrupting, sexually corrupting, or that he or she is trying to undermine the child's loyalty to the other parent, for instance, where the father cannot take the child out without saying how frightful the mother is. A bar on access is imposed on a parent only after the court has warned him or her two or three times that if the behaviour continues, access will be disallowed. I know of several cases where the warning has been ignored and the right to access has been taken away. But in the normal case the court allows access to the guilty party, with boarding school children, usually half the holidays, with non-boarding school children, usually a whole day every three weeks or something like that, and a few nights in the holidays.

The problem, however, which I want to put to you is that of the case where the parties do not want the court to intrude. In the average case the parents make their own arrangements. In these cases both parents will probably be trying to do their best for the child but of course they may be selfish and biased and upset by the back-up. Now, if every single divorce case is investigated by a welfare officer, it will mean, of course, a good deal of expense, a good deal of interference with people's private arrangements, and in most cases it will probably be found that the arrangement the parents have made is the best one. In some cases it will be found that it is not. In those where it is not, there is this further problem: is the court going to impose on the parents an arrangement which they did not want, with the possibility that even though the court's arrangement is in theory a better one, it would in practice work out worse for the children because it would not have the parents' enthusiastic co-operation behind it? In the undefended cases the court can never get to the bottom of the matter without an investigation. Is there any means of gauging whether there are so many cases where the wrong arrangements are made that it would be worth while investigating all the cases in the hope that some cases would be found in which better arrangements could be made for the children?—I have no figures as to the proportion of unsatisfactory arrangements. I can see your point about the vast amount of work involved perhaps for very little gain. But I should have thought it would have been worth while, for a period, investigating all cases so that the arrangements for the children could then be approved by the judge after an enquiry.

9154. What you would have to have, I think—probably the best feasible scheme—would be an enquiry by someone, say the local children's officer or the probation officer, who would merely bring before the judge the bad case?—It could be a very short enquiry. The result

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might be that nothing could be said against the arrangements at all; the home is known; the father is a decent person. The divorce is just had look. That would not mean a great deal of work if it can be accepted from you that the vast majority of the arrangements in undefended cases work well.

9155. I am not sure you can accept that from me. I am merely going on the assumption that the average parents want to do the best for their child.—When they have got to that emotional state between themselves I doubt whether they can make plans which are the best for the children. Their first thoughts may be not in the interests of the child but getting on with the divorce as quickly as possible.

9156. That may be so in a large number of cases where the question of custody is not really the deciding factor but in some cases a parent will contest the whole suit although interested only in custody. Some parties, I should have thought, possibly do not defend cases they might have won because they think the arrangements about custody would be satisfactory to them.—I do not know enough about procedure, but presumably in presenting cases for divorce the solicitor concerned has to go into the question of the welfare of the children. Is it possible that the solicitors could be given some sort of responsibility for producing a plan for the children which the judge would have to approve?

9157. I do not think that would have any practical value. Solicitors are just as badly placed as the judge. They see a perfectly nice person sitting telling her story. They have not seen her looking after the children and she may be a frightfully bad mother. I think that one has either to have trained personnel—whichever service is chosen—investigating every single divorce where there are children and reporting to the judge whether a case needs further investigation or not, or to leave things as they are in cases where the judge would never get the full picture without enquiry.—I should come down on the side of investigating every case, because I think there are some cases where severe damage is being done to the children because there is not an investigation.

9158. Now I want to ask you a question about this matter of supervision. My Lord has told you what happens in the Chancery Division. In the Divorce Division what happens is that where there is not a fight the judge may try to find out about the children and study what the parents both want. You may take it that that is fairly ineffective. Where there is a fight the judge hears the parents possibly, depending on the charge, on the care of the children and possibly hears relatives.—I do sometimes see grandmothers. He has the report of a welfare officer who has been into the home and talked these things over with the people, and then he comes to a decision. Would you say then, if he is dealing with a child of seven, that you would have somebody investigating that child every few months up to the age of fourteen?—Not every few months, but I think perhaps an annual report might be a good thing.

9159. Annual? I have used two methods. Dealing with the case where there was no reason to suppose there was trouble ahead, I have asked the welfare officer to look in on the parents rather unobtrusively every two months or something like that. Then I have had cases where I have made them both promise to write to the welfare officer if either thinks the other is being disloyal. That is a possible way—to say to the parents, "Write to the welfare officer", and of course then they will.—It seems to me that the six months immediately after the pronouncement of the divorce are going to be a disturbed period for the child in any case, with new surroundings, and a new life. I should have thought that after about six months it would be a good thing if the child was seen in its environment in the home by a trained social worker, and possibly at that stage the matter written off for the time being and then, as I say, possibly some sort of report obtained perhaps a year from then or something like that. There may be other instances where the visiting probation officer is less happy and may want to come again more frequently.

9160. Are you talking now of the general cases? You see, the huge proportion are those that are never contested.—I am discussing ordinary, general cases really. I should have thought at least one visit in those would have been advisable.

9161. A sort of follow-up after a year?—Something of that sort.

9162. Yes. Now, about access. I gather that you are not one of those who think that access is bad for the children?—I am not.

9163. When the mother goes off with the children, it creates social injustice if you say to the father, "You are never going to see your children". The attitude taken by the court is never to bar access unless there is a really serious reason against it. You would not disapprove of that?—No, I would not.

9164. Are you not under-estimating the good meal and the cinema with Johnnie, because you see the point is, it keeps the father in contact? The child may run into trouble in its lifetime and think, "There is a father who gives me a meal, I might go to him in trouble".—That is better than nothing; I should be disappointed if that was the only contact that took place. We want something rather more than that. If out of that could grow a better relationship between the child and the father, that would be better.

9165. You would prefer a week by the sea rather than lots of odd lunches and so on?—I think so, yes.

9166. There is one other question I should like to ask. When a judge sees the child in these cases he can adopt one of two methods. One method is to discuss what the child thinks of the mother and father, what it really wants and so on. The other way is to dodge round the fringes and for social conversation to talk about birthday parties and whether daddy came and so on. One sometimes gets quite a good reaction out of that method, but of course one is often left pretty neutral as a result. I would like to have your view. The latter method is the one I am inclined to adopt as a rule. I feel the other way puts too much of a responsibility on the child, who may have been filled up with propaganda and feels he has got to work on you. He is too much the arbiter of his own destiny. Do you think that it does not hurt children of eight, nine and ten at all to ask whom they want to live with and to let them hold forth on the subject of their parents' divorce?—It is an awfully difficult problem. I do not think it does children any harm to talk about it freely. They have been living in the atmosphere where everybody has been talking about it. It seems to me that an outsider can help them if they feel he is there to help them. I think that it can do no harm for the child to talk freely, if there is a trained person to distinguish between the child's natural feelings and the propaganda. I should have thought it did no harm but it is very time-consuming. It is not a ten-minute job.

9167. They run down in thirty minutes as a rule.—I should have been afraid that, time being so precious, one would have to break off just when things were getting interesting.

9168. (Lord Keith): Might I ask one question in supplement? Is it any good, do you think, to say to a child, "Would you rather stay with Mummy or with Daddy"?—Not just that plain question.

9169. You do not think that the answer should influence the judge?—No, I do not think so.

9170. (Lady Bragg): Suppose that the child was visited by the welfare officer at the end of six months and he did find that the child had behaviour problems and was unhappy, and reported back to the court, what would be the next step? It would not necessarily mean that the child was with the wrong parent, would it?—Not necessarily. I imagine that the welfare officer would not only report on the circumstances as found, but would possibly make suggestions on what we might broadly call treatment; he might well say that the child was very disturbed and that he thought possibly psychological treatment or a different school might help.

9171. Would not the judge have taken over a new function in a way? He would then become a kind of welfare officer himself?—He would be on the way to becoming a children's specialist.

9172. I see; rather a curious situation perhaps?—I suppose the trained worker could urge on the parent certain lines of managing the child, but possibly that would have to be done as a good turn rather than with any authority.

25 January, 1953]

PROFESSOR ALAN MONCRIEFF, C.B.E., M.D., F.R.C.P.

[Continued]

9173. It seemed to me that there were these two possibilities, either the welfare officer takes the responsibility upon himself or herself of acting in an advisory capacity to the child, or the welfare officer reports back to the court on the position. In the latter event I do not see what happens next, unless the welfare officer is quite sure the child is with the wrong parent?—I think if things are grossly wrong, the welfare officer must report back to the court, but there may well be instances where friendly advice on the occasion of the visit is all that is required.

9174. (Mr. Beloe): As I see it, there is a principle behind what Professor Moncrieff has been saying. Will you tell me if I am correct: that the State has no right to interfere with an ordinary child, with ordinary parents, unless the child commits delinquency or is cruelly treated, but where a child is deprived of its home by the fault of one or other of those parents, possibly both, there is a certain duty on the State, in the shape of the court, to see that the child is all right?—Very definitely. That is putting it much better than I put it. The State has recognised the breaking up of the home and in doing so it seems to me accepts some responsibility, *ipso facto*, for the welfare of the child.

9175. Then there is just one small point. You know the report which the juvenile panel gets; there is something from the school, something about the home. As a matter of fact, that does not take a very great deal of time to produce. Do you think anything like that might help the judge?—Definitely. That is what I had in mind. I realise that its preparation does not take all that time and it is most useful to the court.

9176. It is not exhaustive at all?—The official from the Education Department comes to the court and gives a report on the child which includes scholastic attainments, difficulties at school, something about the home. In addition, the court can get a medical report at the same time from the school medical officer. That is the sort of report I should have thought would be most helpful to the judge.

9177. And the judge from that point would decide if he wanted more enquiries made?—In many of the cases, it would be sufficient. If it were known by the public that some sort of enquiry of that type would be made it might perhaps induce them to consider the welfare of the children a little more.

9178. (Mr. Justice Pearce): It would not be any use to me at the early stages to be told anything except as to the arrangements which are to be made for the child. If I am told that they are not the best that can be made, I can get reports from somebody. To say that the child is bad at school, or bad at this or that, is no use to the judge, but if he is told that the child ought to be with the grandmother, the judge knows what he is doing. (Mr. Beloe): Mr. Justice Pearce is suggesting a different quality of person from the one you and I were thinking of?—Yes, he is.

9179. (Mr. Meese): Do I understand that you want the children of parties in divorce proceedings to come before the juvenile court?—What I suggested was that that might be one solution, where it was obvious that the arrangements that had been made by the parents had not been approved by the court at all and were bad for the child; in that case the child might in fact qualify to be brought before a juvenile court as being in need of care or protection.

9180. You appreciate that for a child to go before the juvenile court would cast some stigma on the child?—Not if the child is in need of care or protection. The stigma then is on the parents.

9181. You are on the panel of a juvenile court. Have you ever been outside a big juvenile court where the parties are waiting to be heard?—Yes, Sir.

9182. That is when the youngsters meet; some of them are kept waiting two hours for their cases to be heard. I want to avoid the children of parties to divorce proceedings having to come into that atmosphere. You do appreciate that?—I see your point, but that is a criticism more of the court arrangements than of my proposal.

9183. (Mr. Flecker): In divorce cases, I believe it is normally customary for children who are material witnesses to come into the court and give evidence to the judge with counsel present, probably their parents there as well. I have no doubt they are treated with extraordinary kindness by everybody concerned. I wondered if you would be prepared to say if that was a good thing for the child, or whether it would be well to advise that, unless there was some reason against it, the evidence of a child should be taken privately by the judge. Have you any views on that?—Definitely. I think it is a shocking experience for a child, however kind the court may be, to have to go and give evidence in that way. If it can possibly be avoided I think it should be.

9184. Very occasionally teachers have given me the impression that they could give more help in regard to reports on a child, because they see the child's work beginning to go down suddenly and so forth. Is it your opinion that the welfare service do make use of the schools as they should and that the schools are as co-operative as they should be?—I think that the schools are always co-operative if asked. I think we tend to forget the large part a teacher plays in a child's life and more use could be made of it. Public schools are rarely asked on these matters. (Mr. Flecker): They usually take the initiative, in my experience.

9185. (Mr. Bryson): I would like to say a word or two about your statistics. The first series of statistics was based on the study of children coming from homes where there were defective family relationships. Is that correct?—Yes.

9186. Only a proportion of them would be coming from broken homes? Can you tell us what proportion was from broken homes?—No, Sir, not offhand. It is in the tables in the book.

9187. Is the proportion of broken homes due to divorce also given?—The Burt figures were in respect of homes broken by desertion, separation or divorce, not by death.

9188. A separate series of statistics was based on children from homes where there was a disturbed home atmosphere. What is the meaning of "disturbed home atmosphere"?—It was described as a child living with one parent and the parents living apart.

9189. From these figures, again, can you tell me the proportion due to divorce?—No, Sir, not without reference back.

9190. Are you familiar with Professor Ferguson's fairly recent study?—Yes.

9191. Would you agree with his general conclusion that the broken home is not a major factor in juvenile delinquency?—Not altogether. There are various puzzling things about Professor Ferguson's figures.

(Chairman): Thank you very much for coming to help us.

(The witness withdrew.)

PROFESSOR SIR DAVID HENDERSON, M.B., Ch.B., F.R.F.P. & S. (Glas.),  
and DR. I. R. C. BATCHELOR, D.P.M.

## PAPER No. 120

MEMORANDUM SUBMITTED BY PROFESSOR SIR DAVID HENDERSON,  
M.B., Ch.B., M.D., F.R.F.P.&S. (Glas.), F.R.C.P.E., F.R.C.P. AND  
DR. I. R. C. BATCHELOR, M.B., M.R.C.P.E., D.P.M.

1. We beg to submit a memorandum in relation to the Matrimonial Causes Act, 1937 (England), and the corresponding Act in Scotland.

2. According to the above Acts a petition for divorce may be presented to the court by the husband or the wife on the ground that the respondent is incurably of unsound mind, and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition.

3. In either case it must be shown that the pursuer has not been guilty of such wilful neglect or misconduct as has contributed to the insanity. In England the Act includes those who are under treatment as voluntary patients but in Scotland voluntary patients remain outwith the Act.

4. Considerable dubiety has always existed in relation to the proper interpretation of (1) incurability and (2) continuously under care and treatment. We understand that incurability means that there is reasonable certainty that the patient will not recover, but that it is not necessary to state that recovery is utterly inconceivable. *Continuously under care and treatment* is taken to mean that if the patient is allowed home for a few days subsequent proceedings may be invalidated.

5. We were strongly opposed to the Matrimonial Causes Act at the time of its introduction, and we are just as strongly opposed to it today. Our opposition is based on the fact that we believe it to be an unjust Act which adds considerable difficulty to the treatment and care of a group of persons who, because of their particular disability, are unable to safeguard their own interests; they are differentiated and penalised because of an infirmity which they have had no power to prevent or resist.

6. For the sake of conciseness and clarity we have attempted to tabulate the medical grounds which have influenced us in our opinion.

## (A) General criticisms

(1) Divorce is not allowed on the grounds of physical disease or injury, which may be severe, incapacitating, prolonged over many years or incurable, and which may prevent the sufferer fulfilling the obligations of the marriage contract. In this Act, therefore, an invidious distinction is made between those suffering from physical illness and those suffering from mental illness. This distinction is invalid from a medical standpoint, and from a humanitarian standpoint unfair. Both groups of people equally are ill and suffering.

(2) The invidious distinction thus made between physical and mental illness increases the stigma already excessively attached to mental illness and to treatment in mental hospitals, and thus renders more difficult the treatment of mentally ill persons in our community.

(3) Divorce on the ground set out in this Act can and does bring great unhappiness to certain mentally ill people, by depriving them of the continued affection and support of their spouses and by removing their hopes of recovery and of a return to their homes. By inflicting a further severe blow it adds yet another mental stress to those which have precipitated the illness, and diminishes the chances of an eventual recovery. The fact that the doctor who is treating the patient has to certify that he or she is incurable, prejudices confidence and co-operation in treatment. It is obvious that treatment is very unlikely to have a successful outcome when the doctor himself has stigmatised it as hopeless.

(4) It seems that many who have spoken and felt in favour of this Act have entertained two serious misapprehensions. First, that after a period of five years' continuous care and treatment in a mental hospital a patient is necessarily without affection, proper feelings, interests and sensibility, and is in effect intellectually and emotionally dead. Second, that insanity is frequently caused by the "irregular and vicious habits of the insane person", and is therefore self-induced. These misapprehensions have enabled ineffectual men and women to

hold a prejudiced view of a situation which otherwise would have appealed more to their sense of justice. Though in some cases a state of dementia develops, a person may after five years' continuous stay in a mental hospital still be in many ways well-preserved in personality, sensitive, and discriminatingly aware of events. It must be said also that mental illness is still too often thought of superstitiously by the lay public as a punishment or just retribution; and it is this distorted view which seems to sanction a further punishment of the unfortunate and sick individual, carried out under the terms of this Act. If blame for the illness in these cases is to be laid at the door of some one individual, it should in some instances be laid at the door of the spouse, who may later be the petitioner for divorce. In many instances we have been required to inform patients that an action of divorce is being sought and has been granted. When this very painful duty has been carried out many of the patients have replied by saying, "I have done nothing to deserve this".

## (B) Criticisms of the details of the Act

(1) Insanity is too vague a term. It is a term of legal convenience, not a medical entity. There is no such disease as insanity. Insanity stands for a category of mental illnesses, with very different features, causes, and outcomes. To legislate for all these illnesses as if they were similar is entirely arbitrary and unsatisfactory.

(2) To judge the outcome of an illness from a period of five years' observation is arbitrary. Continuability and incurability are not fixed aspects of illness. What may be incurable today may be curable by new methods of treatment next year, or five, ten, twenty or more years hence. Already the brain operation of leucotomy makes a statement of incurability in certain cases very difficult. Further advances in treatment are to be expected. It must also be stressed that more or less spontaneous recoveries occur after five years, and more than five years, of continuous care and treatment.

(3) This Act makes distinctions between periods of treatment in hospital on a certified and on a voluntary basis. It tends to prejudice the voluntary system of mental hospital treatment. It must be recognised that a break down in mental health necessitating admission to a mental hospital may be preceded by months or even years of domestic discord and unhappiness. When mental hospital admission is decided upon for one of the marriage partners, the possibility of a divorce may therefore be in the minds of both parties. The sick individual may for this reason hesitate to accept in-patient treatment; while the spouse may press for the sick person's certification rather than for treatment on a voluntary basis, which might not count for divorce purposes. Later, periods of parole, the willing re-acceptance of the sick individual in the home, and discharge from the mental hospital, may all be treated in a biased way, if the question of a divorce is at issue. Cases can be quoted from the English courts of the anomalous situations which may arise.

7. For the above reasons, we trust that divorce because of insanity will be earnestly and seriously reconsidered, and we hope that the Act may be rescinded. In our opinion the continued operation of the present Act is an important factor leading to the disorganisation of society by effecting a transgression of the marriage contract, and the sanctity of the marriage vows.

8. We recognise that there are many hard and unfortunate cases but we believe that it would be possible to settle such cases on their merits, judicially, rather than by Act of Parliament. Individuals and circumstances vary so much in each particular case that, in our opinion, it is impossible and inequitable to formulate rules and regulations which can be applied to all and sundry.

(Received 20th December, 1951.)

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28 January, 1953]

PROFESSOR SIR DAVID HENDERSON, M.B., Ch.B., F.R.F.P. & S. (Glas.),  
and Dr. I. R. C. BATCHELOR, D.P.M.

## EXAMINATION OF WITNESSES

(PROFESSOR SIR DAVID HENDERSON, M.B., Ch.B., M.D., F.R.F.P. & S. (Glas.), F.R.C.P.E., F.R.C.P.  
and Dr. I. R. C. BATCHELOR, M.B., M.R.C.P.E., D.P.M.; called and examined in private.)

9192. (Chairman): Professor Sir David Henderson and Dr. Batchelor, may I read through your qualifications so that you can correct me if I have not got them right? Professor Sir David Henderson, you are M.B., Ch.B., M.D., F.R.F.P. & S. (Glasgow), F.R.C.P.E., F.R.C.P., and you hold the Chair of Psychiatry at the University of Edinburgh. Is that all correct?—(Sir David Henderson): That is correct.

9193. And Dr. I. R. C. Batchelor, you are M.B., M.R.C.P.E. and a member of the Psychiatry Department at Edinburgh University?—(Dr. Batchelor): Yes, I am a lecturer in psychiatry at Edinburgh University.

9194. You have kindly given us a very clear and helpful memorandum. Before we ask you any questions would you like to add anything to the memorandum?—(Sir David Henderson): No, Sir, I do not think so. I think we should like to apologise for having the temerity to present a memorandum of our own without the backing, so to speak, of our colleagues or any association. We are here purely as individuals presenting our own personal views.

9195. No apology is needed. We have many memoranda from individuals and yours is of great interest because those who suggest that insanity as a ground for divorce should be abolished are comparatively few in number. If there is nothing more you wish to add, I have one question to put on the last paragraph of your memorandum. It was the only part I felt difficulty in following. After recommending that insanity as a ground of divorce should be struck out of the Act you go on to say:—

“We recognise that there are many hard and unfortunate cases but we believe that it would be possible to settle such cases on their merits, judicially, rather than by Act of Parliament. Individuals and circumstances vary so much in each particular case that, in our opinion, it is impossible and iniquitous to formulate rules and regulations which can be applied to all and sundry.”

I do not see what you have in mind when you say that hard cases should be settled on their merits, judicially. Surely you have to determine what are the grounds upon which the court can or cannot grant a decree of divorce or separation. How can you envisage the matter being brought for a judicial consideration at all unless you lay down something in a statute?—I think we felt it was impossible for us to see a way out of this particular dilemma, but we thought maybe the legal people could determine how they might perhaps approach this matter judicially without enlisting the aid of an Act of Parliament to carry it out.

9196. The judiciary cannot very well interfere in the private lives of people unless there is an Act of Parliament which enables them to do so. Furthermore, where a couple have fallen out, unless one or the other is given the power to go to the court, the court cannot intervene.—I thought that one or other of them might make a complaint and be able to start a case which could go for argument to, say, the Court of Session, where the whole position could be discussed without there having to be some Act of Parliament or special regulation laid down.

9197. (Mr. Justice Pearce): I think Sir David means that the case should be argued before the court and the court should have a discretion to grant or refuse a divorce.—Yes, give the court a discretion. That is the point that I have in mind. There are so many people who are characterised as being insane, yet at the same time have sufficient reason whereby they can instruct a lawyer to appear for them.

9198. (Chairman): Supposing that it was not considered practicable today to abolish the ground of insanity, I wonder if you have considered any alteration of the existing law?—I have not given any consideration to any other proposal. I felt that this was an issue which could be tackled entirely on its merits. I have had so much experience in relation to insanity that I have no hesitation in feeling that the Act should merely be restated in this particular because of the hardship. I have not formulated any alternative proposal.

9199. Does that apply to you also, Dr. Batchelor?—(Dr. Batchelor): Yes.

9200. Then I will not pursue that point. I have only one more question. In your view, is it possible today to say that anyone is incurably insane?—(Sir David Henderson): Yes, I think it can be said, after a time, presumptively anyway, that one cannot do any more and that the condition has lapsed into such a state that one cannot look forward with any optimism to any betterment of that person's condition. I think one can go as far as that.

9201. (Sir Russell Brain): Your memorandum is so clear that I have really little to ask on it, but would it be fair to say that you feel that incurable disease of the mind does not differ in kind from incurable disease of the body?—Yes, that is my view.

9202. You would not accept the view which has been put that it is more disruptive of the marriage state for a person to suffer from an incurable disease of the mind than from an incurable bodily disease?—The former has greater reverberations on the family and the family group, there is no doubt about that; all the implications regarding such problems as marriage of any children of a family where mental disease exists, and a great many other things, come into the picture; which does make it much more serious than the question of physical illness. Yet actually so far as the married state is concerned I consider that mental illness is no more disruptive than some forms of physical illness, though it has greater reverberations.

9203. I thought it would be helpful to the Commission if you could comment on certain particular points, assuming incurable insanity remains a ground for divorce. If I put them individually perhaps you would say whether you would wish to answer or not. If incurable insanity remains a ground, is it desirable to retain the requirement of a period of cure and treatment or should there just be medical evidence that the insanity is incurable?—I think I would prefer that there should have been a period of cure and treatment. I do not think medical evidence by itself would be sufficient to allow one to have investigated the position fully enough.

9204. Then, do you think, in the light of the effectiveness of modern treatment, that that period could safely be reduced to less than five years?—No, I do not think so. I think modern treatment or so-called modern treatment is still in a very experimental stage and we do not know how far further so-called modern treatment is going to be able to give us a very much surer basis even than exists today. In the last twenty-five or thirty years things have changed so much in hospital practice and in hospital work, that with all the associated work that is going on today in neuro-surgery, physiology and research, we feel it may not be very long before we shall be very much more knowledgeable about these matters of the mind than we are at the present time. That is the position I take. Why should one legislate, so to speak, for the state of knowledge at one time, when within a matter of a few years that knowledge may change very quickly?

9205. Would you agree that, as a result of modern methods of treatment up to date, many more patients are discharged from hospital partially recovered than was the case in the past?—Yes, I think more, but I would not say a great many more. I do not think that we get sufficient credit for what we accomplished in the past, before modern methods came into existence. There are a certain number of discharges that are expedited today. I think that there is a shorter period of hospital residence, but I doubt very much whether the results actually accomplished are very much better than those accomplished previously. That is my view. Furthermore, while some are partially recovered, I think a good many more are really satisfactorily recovered today as a result of the methods that have been introduced. I have had many people who have told me that their spouses were infinitely better after they had had a leucotomy or electrical treatment than they had been before and that they have been able to take up their family obligations and look after

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[Continued]

their families to a very satisfactory extent indeed. There is no doubt the results have been quite impressive in individual instances.

9206. They fortunately would constitute no problem?—No.

9207. It is the partially recovered I was thinking of. If the law remained somewhat as it stands, would it be safe to apply the criterion of incurability to patients who have been discharged partially recovered, but who, as far as one can tell, will never completely recover and whose conduct may be abnormal?—No, I do not think I could go as far as that. I think that if a person can make a reasonable social recovery I would regard it as a recovery, apart from the fact of whether he had made a complete recovery so far as the mental aspects of his illness were concerned. It would be the ability to fit into the social life that would be my criterion as to the amount of recovery that had taken place. I think one should make a distinction between a medical recovery and a social recovery.

9208. In other words, it would be the behaviour of the patient that would be the important point?—I think so.

9209. (Sheriff Walker): In Edinburgh there is a mental home called Craig House?—Yes, I have charge of that.

9210. How many patients approximately are kept there?—At Craig House we have approximately 350.

9211. And the same at Morningside?—They are both part of the Royal Edinburgh Mental Hospital. We look after a group of 1,200 patients.

9212. Who are under care and treatment?—Yes.

9213. You say in your memorandum that sometimes when you had to intimate to a patient that an action of divorce was being brought the patient would say, "What have I done to deserve this?" or something like it?—Yes.

9214. In such an instance, is it your opinion that the patient has a reasonable enough understanding of the consequences of the divorce action being served?—Yes.

9215. And a normal emotional reaction?—Yes.

9216. Is that your view?—Yes, I think it is the most painful duty I have to carry out.

9217. There will be many patients, I suppose, who, if an action were served on them, would have no understanding at all. Am I right in that?—There are one or two, there are not many. In my experience over a great many years now, the vast majority have skill, even after a period of five years, sufficient understanding and realisation that they are being placed in a very unsatisfactory position. It means that in many cases the children never come to see them and they have a feeling of utter hopelessness which I think invalidates their making a recovery which, even after that period, they might otherwise do.

9218. What occurred to me was that if a person who is, as it were, under permanent detention, could realise and respond emotionally to the injustice of being divorced for no offence, that would be a very dreadful injustice?—That is what actually happens. I have no doubt about it whatsoever, none at all. I think it is like locking a man when he is down. Here is a person who, through no fault of his own, has been put under care and treatment in a mental hospital. Later there comes the possibility of divorce proceedings. The person may have led a respectable life, in many cases may have brought up a perfectly decent family, yet he is subject to this indignity of having a petition served on him telling him he is to be divorced. There is no reason for it, he has not done anything wrong, but it is the law.

9219. (Chairman): You are speaking, as I understand it, of people who are incurably insane. If they were not incurably insane there could not be a divorce?—I am speaking of people who have been detained for longer than five years in many cases, where continued mental hospital residence is absolutely essential, yet at the same time any sort of friendship or humanitarian aspect is taken out of their lives by the fact that those that are nearest and dearest to them form other attachments.

9220. You are speaking of the contrast between the time before the divorce, when the person still has a wife, and the time after the divorce?—Yes.

9221. And you say that these consequences follow after the divorce?—They follow after the divorce and they follow if there is the possibility of such a divorce occurring.

9222. (Sheriff Walker): In the Divorce Act there is a presumption that the person is incurably insane if he has been under care and treatment for five years, but there is also a provision that the contrary may be shown by evidence?—Yes.

9223. Have you ever known a case in Scotland where it was attempted to show that the insanity was not in fact incurable, or has that not come within your experience?—No, I do not think I have had any experience of that.

9224. Supposing you were asked, as a medical expert, in the case of a patient who understands and emotionally responds normally, whether that defender would be in a position of soundness of mind to defend an action that was brought against him, what would be your view about that? Would you say he was sane enough to defend an action?—Yes, I think many people are, even though they may be certified because of their own personal state, yet they have sufficient ability. One does not hesitate to say that a person is competent to make a satisfactory will or competent to give instructions for the management of his affairs, so I think in these circumstances there are many of our mentally ill patients who might be able to put up quite a sound defence and instruct their lawyers.

9225. What I am interested in is to know about the degree of insanity. I am assuming the insanity is permanent, but am I right in thinking that the degree of insanity may be only very slight in a particular person?—Yes, that is so.

9226. Would it improve the position if incurable insanity as a ground of divorce was restricted to those cases in which the degree of insanity was such that a patient did not have an understanding of his marital position?—I do not think so. It is mixed up with ethics to a great extent, but I think one has to be quite definite about this. Insanity in its various forms is after all an illness but it is an illness that is picked out and differentiated and regulated in this particular way and ethically and medically I think it is completely and absolutely wrong to do so.

9227. (Chairman): May I just follow that up? I quite follow your attitude, and it is one that gives one very great food for thought, but there are people who take the opposite view, as you realise?—I know.

9228. I think what Sheriff Walker has in mind is this. The situation would be at least improved, perhaps not from the ethical point of view so much as the practical point of view, if the remedy of divorce for insanity could only be awarded if the patient was incurably insane and incapable of appreciating the meaning of the event which had happened. In other words, the patient must be quite incapable of understanding he had been divorced. I suppose, even then, the result might still be that his number of visitors would be decreased?—Yes, I think it would. I think the interest would be lost to a very great extent and I think the numbers coming under a category like that would be so small, it would seem to be almost ridiculous to introduce legislation to attempt to deal with such few cases. I suppose in Scotland yearly in all our mental hospitals together there are only about twenty divorces a year, which is a very small number.

9229. (Sheriff Walker): Taking your 1,200 patients, I want you to concentrate on those who are incurably insane?—Yes.

9230. Can you give any idea what proportion of those who are incurably insane would have any emotional reaction to a decree of divorce?—I would not be able to generalise about that, it is too difficult and would be most misleading.

9231. I thought you indicated that those who could not appreciate the position to that extent would be comparatively few?—Comparatively few, yes, amongst the patients aged between twenty and sixty. Of course, one

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[Continued]

is today dealing with many aged and elderly people, amongst whom the problem does not arise very much.

9232. (Dr. Robertson): May I venture to ask whether deliberately there is no mention in this memorandum of mental deficiency because of it being considered incurable and ascertainable before marriage?—We thought we could only be of any help to the Commission, and perhaps do justice to ourselves, by talking about those cases we actually have had experience with and we did not want to branch out into other fields about which others could talk a great deal better than we can.

9233. (Mr. Young): Have you experience of cases where on a divorce petition being served upon a patient, far from objecting to it he welcomes it or recognises that his wife ought to have a decree?—Yes, to be quite fair, I have had the experience where a person served with a petition of divorce has said, "This is perfectly all right, I am satisfied about it".

9234. You would not object on principle therefore to a person who is under care and treatment being divorced if he or she consented to it?—I would still object because I do not think that it would be right to take the opinion of such a person in regard to that or any other matter which was put before him. Such people are in that fragile state of mind in which they would agree to any suggestion that was put to them. I would feel that I must safeguard their interests.

9235. I am talking as a lawyer in this matter. You have just said, and we all know it is a fact, that people may be competent to make a will while in a mental hospital, and you say that there are people in mental hospitals who are quite competent to say that divorce is the best thing that could happen?—You put me in a hole. I do not think I would agree all the same. I might not be very logical about it but I would not agree with your point of view.

9236. (Chairman): I wonder if this is a possible point of view: even if they are willing to assent, it may be they are doing it either because they are rather feeble, as you say, or simply out of sheer self-sacrifice. Is that a possibility?—Yes, I think it is more the facility than the self-sacrifice.

9237. (Mr. Mace): May I ask on that, is it the law in Scotland that a person certified can make a will?—In certain cases, yes.

9238. (Lord Keith): An insane person may have lucid intervals. (Mr. Justice Pearce): Theoretically that is so in England, but it is not very easy. (Lord Keith): Or they may be insane on one thing and perfectly sane on another.—I have frequently given a medical certificate certifying that so-and-so can make a valid will.

9239. (Mr. Maddocks): Before you came to this emphatic conclusion, did you consider the position of the people who were married to these insane persons who have been in institutions for five or seven years and what it must be like to be tied to an insane spouse?—I have considered their position very much indeed, but we believe that medically our first duty is to the patient under our care. I have to safeguard that person's interest and do all I can personally to help that person to get well.

9240. (Mr. Belloe): You said, "help that person to get well", but I thought you had established that that person could not get well?—I do not think so. There are all sorts of things that happen. Over many years I have seen people who have made remarkable recoveries after a far longer period than five, seven or even more years.

9241. (Chairman): That is why I asked whether you were speaking of people incurably insane, that is to say, people who will never recover?—There are so many curious things that happen. Even where doctors have given extremely gloomy reports about people suffering from physical illness, yet those people have been able to function for a great many years, so it is in our branch of work, perhaps even more so. We are always dealing with the unexpected and we see extraordinary results occurring from time to time, which we hardly dared to think were possible.

9242. (Mr. Belloe): Then, I understand that in the case of patients in your institution, even if they have been there for five or seven years, they can react very unpleasantly to the presentation of a divorce petition?—Yes.

9243. Secondly, people who might have recovered might be prevented from doing so by such an event?—Yes, I think it is another thing that tends to take hope out of people, and after all, if you destroy hope you are destroying something that is very precious to that particular individual.

9244. But then surely these people would not be considered incurably insane if there were a possibility of their getting better?—I think it is so hard to lay down an absolute law in regard to that. I could not possibly attempt to do it. I think we can only say that so far as we can honestly say there is little chance of an adequate recovery taking place, but we are often agreeably surprised when such an event occurs.

9245. So that under the Act somebody might be presumed to be incurably insane because he had been a detention for five years, and yet there might be a chance of recovery?—I think very much so, and I think the under-pregat-day conditions, with the development of new hospital organisations with greater facilities for treatment along all sorts of lines, that possibility has increased.

9246. (Sir Russell Brain): Would you agree that there is a certain group of cases in which you could say that there is no prospect of recovery, what is called in lay terms softening of the brain?—Yes.

9247. And then would you say that there is another group where, although it is improbable that recovery will occur, it cannot be ruled out even after ten years?—That is so.

9248. (Chairman): In the latter case, supposing you were asked, is this man or woman incurably insane, what would you say?—I do not know what I would say. I think it is a matter that would have to be very carefully gone into and all the aspects of the case would have to be considered. I do not know that one could make any categorical statement, it is too difficult.

9249. (Mr. Lawrence): The hardship which the Acts of 1937 and 1938 were designed to relieve in this matter was the hardship of a man or woman married to somebody who, although still alive on the earth, was "intellectually and emotionally dead", and therefore in rather a difficult category from a partner who had become affected by some physical disease, maybe of an incurable nature, yet who was intellectually and emotionally alive. Do you follow that?—Yes.

9250. Now what you have said in your memorandum has disturbed me because I gather—tell me if I am wrong in my conclusion—that there may well be cases where people have been divorced under these two Acts as being incurably insane who yet are far from being intellectually and emotionally dead?—That is what I believe.

9251. And they are people who, so far from being necessarily without affection, proper feelings, interests and sensibility, do in fact possess all those qualities?—Up to a point that is quite true.

9252. Up to a point, and yet upon the evidence of its superintendent of the institution they would be said to be incurably insane?—Yes.

9253. And of course, if that is so, in relieving us hardship, the Acts have undoubtedly inflicted another hardship on that view?—That is my view.—(Dr. Batchelor): I agree.

9254. I think we shall have to consider this as judicially as we can, not so partisan on one side or the other?—(Sir David Henderson): Yes, I think so.

9255. It may be a question of the balance of hardship if those are the facts. In your very wide experience, for this class of incurably insane person who is subject to divorce proceedings and who possesses up to some point these qualities of affection, proper feelings, interests and sensibility, form a substantial number?—Yes, I would say it forms a substantial number, maybe not a substantial proportion of all our patients, but a substantial number.

9256. This is perhaps not a question of opinion or ethics or anything, but really a question of fact?—Yes, I know.

9257. In applying the provisions of these Acts to relieve the hardship of a person tied to somebody who is technically described as incurably insane, we are first inflicting a hardship on an entirely innocent person—

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[Continued]

I think one has indicated a hardship. One cannot get away from the fact that these people are ill; why should they be picked out because they are mentally ill?

9258. I am not dealing with it on those grounds because I think some of us can see a difference, but I am dealing with it at the moment solely on the question of the balance of hardship. I only wanted to get the measure of hardship inflicted by these Acts, or some notion of it. You would say it happened frequently?—I would say so.

9259. (Sir Russell Brain): Would you agree that in this group there are all degrees of feeling and awareness? It is not a sharp distinction?—There are all degrees.

9260. (Mr. Lawrence): I suppose they begin at the stage where they have acute sensibility and it shades off to emotional insensibility at the other end?—Yes.

9261. (Mrs. Jones-Roberts): I gather that, in the first place, you object to insanity being specified as a ground of divorce?—Yes.

9262. On the other hand, I think you recognise that there might be hard cases?—Yes, any amount of them.

9263. Which you would like to hear discussed and settled, maybe judicially. The Chairman has pointed out how difficult it would be, but I wonder if you had something on these lines in mind? Where a spouse had been under care and treatment in a mental institution, whether certified or not, say for a period of at least three years—it might be five, seven or ten—the other spouse might then bring a petition on the ground of desertion, a defence could be entered and the whole medical position could then be investigated and examined. I would like to hear you on that particular point.—I would hate to feel that a person could be placed in a mental hospital, usually on the request of the nearest relative, the husband or the wife as the case might be, and then be divorced for desertion. I do not see how desertion could possibly be brought in. I do not know if it would satisfy either the public mind or the legal mind.

9264. I appreciate that. Have you known cases where patients have been for a good many years in a mental institution and have become so accustomed to the sheltered life in the institution that they would be reluctant to return home even for a trial period?—I have met practically none. The usual constant request is, "When am I going home, Doctor?" That is almost invariable and if you were to ask them whether they wanted to stay or go, I think the inevitable answer would be, "I want to go home."

9265. (Chairman): I want to put to you what the medical witnesses said on this point and see what you say about it. They said in their memorandum [See Section 9, page 168, *Minutes of Evidence for the Sixth Day*.]—

"The Council considered whether some restriction should be placed on divorce in cases where the patient, though incurable, is likely to be distressed by the news that he has been divorced. It is not true that all incurable and long-standing patients are devoid of normal feelings, as was suggested to the previous Royal Commission."

So far you would agree?—Yes.

9266. Then the last sentence expresses their conclusion:—

"But the number of patients who might be harmed is probably too small to make a change in the law worth while."

This, I gather, you do not agree with?—No, I do not agree with that.

9267. (Mr. Justice Pearce): In answering Sir Russell Brain you said you would prefer that the period on which you base your judgment that the patient is incurable of untended mind should remain five years rather than be reduced to, say, two years?—Yes.

9268. As far as the group of hopelessly incurable patients is concerned, the advanced dementia and so on, would you be able to distinguish them at the end of two years?—The organic dementias you would distinguish at the end of two years, but these are conditions that occur very late in life, or comparatively late in life. They occur

in the sixties and beyond and in those circumstances the situation is entirely different from that of a much younger age group.

9269. There is a class, how large it is we will not worry, in which one may decide upon incurability as well after two years as after five?—I would say, yes.

9270. There is a class in which one cannot judge incurability so well after two years as after five? That is quite true.

9271. Leaving aside how large those classes are, the effect on the class where two years would be too short a time would be this, would it not, that the medical superintendent would say, "I cannot swear that he is incurable"?—Yes.

9272. And if your Scottish system were the same as ours, would not the effect of having a period of two years instead of five be that the spouses of the persons who are hopelessly incurable after two years would get relief at two years and that the spouses of those persons who are not hopelessly incurable after two years would have to wait a longer period? You see what I mean?—Yes.

9273. At the present time in England it is not always possible to present a petition at the end of five years. It is a commonplace for the medical superintendent to say, "We cannot say the patient is incurable now, we may be able to after another five years." Two years would be just as safe as five years? Do you follow my reasoning?—I follow your reasoning, but I hate to be tied to a time task.

9274. To have a time basis is only to impose a limit before which nobody can apply for divorce?—Yes.

9275. Are you not putting rather too high the proportion of cases where there is an emotional reaction on the service of the papers? My recollection of these cases is that there is a high majority where the patient may just be capable of knowing what a divorce is but is devoid of feeling and out of touch with reality? I do not think I am over-stressing it. I think it is a great mistake to do that. It is what my actual experience has been, going as a doctor to somebody I have known well for years and saying, "Here is this horrible paper, you are being divorced." There is an almost invariable response, and I think my colleague, Dr. Batchelor, has had the same experience. They look at you with pain and bewilderment, they are hurt and upset. I would describe it as almost the most distressful duty I have to perform today in my medical work.

9276. (Chairman): Would you call it a "horrible" paper in speaking to them when you present it?—I tell them, "There it is." I say, "I do not approve of it," but I do not actually say much more than that.

9277. Do you agree, Dr. Batchelor, with the evidence Sir David has given as to the proportion of people regarded as incurably insane who have these emotional feelings? (Dr. Batchelor): As far as my experience goes, I do. I have not had the wide experience of Sir David.

9278. (Dr. Baird): Before we finish, may I ask Sir David and Dr. Batchelor if they can put my figure on the number of cases of divorce with which they have had personally to deal and in which this difficulty of sensibility and awareness arose?—(Sir David Henderson): I would not be able to say that. I should think that from 1937 onwards I have had something like four or five cases a year. I do not think more than that. Again I would assert that in the majority of these, while there are some who are facile and would accept anything, there has always been a response and a reaction.

9279. In perhaps two of those four cases a year? I would put it higher than that.

9280. And Dr. Batchelor?—(Dr. Batchelor): I would agree, but from much smaller numbers. I have personally handled four or five and the majority of them have taken up the position that the divorce is a hurtful thing.

9281. And those were all people you considered to be incurably insane?—We use the term "incurably insane" only with the meaning that recovery is extremely unlikely. We are not required to go further than that.

(Chairman): Thank you very much for your kindness in coming to help us.

(The witnesses withdrew.)

## THIRTY-NINTH DAY

Wednesday, 22nd April, 1953

## PRESENT

THE RT. HON. LORD MORTON OF HENNYTON, M.C. (Chairman)  
 MR. THOMAS YOUNG, C.B.E.  
 MISS M. W. DUNN, C.B.E. (Secretary)

(NOTE.—The Commission agreed to delegate to the Chairman and to Lord Keith, a Vice-Chairman, the responsibility for hearing evidence as to the working of the divorce law in New Zealand. On this occasion, Lord Keith was unable to be present and Mr. Young took his place.)

## PAPER No. 121

## MEMORANDUM SUBMITTED BY MR. W. E. LEICESTER

1. My name is Wilfrid Ernie Leicester. I am a Bachelor of Laws of the University of New Zealand and was admitted to practice as a barrister and solicitor of the Supreme Court of New Zealand in 1920, commencing in private practice in 1924. I have been President of the Wellington District Law Society and for some years a member of the Council of the New Zealand Law Society. I am now senior partner in a firm of four partners. Two of us confine our activities for the most part to the work done by barristers in England, while the other two carry on such work as solicitors normally do in England. The effect of the fusion of the two sides of the profession is that, in a firm such as ours, those partners engaged on the court side touch on all phases of matrimonial matters and, in divorce, are often personally familiar with the brief from the initial taking of instructions down to the final handing over to the client of a sealed copy of the decree absolute. In our Dominion, which has a population of close on two millions (of which only a small proportion are Maori), divorce cases are heard before the Chief Justice and all the ten puisne judges of the Supreme Court.

2. My attendance as a witness before this Royal Commission is at the invitation of the New Zealand Government, but any views I express are my own and are not necessarily shared by the Government. Of all the parts of the British Empire, New Zealand has, I think, the most liberal divorce laws, and this may be due to the fact that we are a primary producing country and expensive legislation has not been the least of our primary products. In much of this legislation we have striven to remedy grievances rather than to achieve theoretical perfection. In the past seventy years, various Ministries have tended to regard New Zealand as the world's social laboratory, and the search for policies of broad humanitarianism, backed up by fifty years of women's franchise and women's organisations of an astonishing number and variety, and to be found in every part of the Dominion, has resulted in the gradual widening of the grounds for divorce. In so far as public morality, in relation to divorce, has been discussed during this legislative process, emphasis has been laid upon the immorality that results, not from the making of divorce easier, but from the retaining of the shadow of marriage when the substance has ceased to exist. Sociologically, at least so far as New Zealand is concerned, there is no proof that the liberality of our ideas in divorce has brought about anything but good.

3. I now propose to deal with our grounds for divorce and shall, in certain instances, give our experience with a particular ground for divorce in the hope that it may be of some interest or assistance to this Commission. Leaving aside nullity at the moment, I would point out that existing grounds for divorce, briefly stated, are as follows:—

- (1) Adultery.
- (2) Desertion for three years.
- (3) Habitual drunkenness for four years.
- (4) Seven years' imprisonment for wounding or doing actual bodily harm to petitioner or children.
- (5) Conviction for murder of child.
- (6) Unsoundness of mind.

- (7) Disobedience of restitution decree.
- (8) Separation agreement for three years.
- (9) Separation order for three years.
- (10) Guilty of rape, bestiality, etc.

The full text of these grounds is set out in the Appendix to this memorandum.

4. *Adultery.* One act of adultery established by the petitioner is regarded by the court as sufficient, and we have never thought it necessary, as in Victoria, to require a wife to prove repeated acts of adultery, or adultery in the conjugal residence, or adultery coupled with aggravating circumstances, or with cruelty or desertion. Even if there is no confessional proof a decree is granted if the court is satisfied that the confession is a true, distinct and unequivocal admission and is made in full, and that there is no doubt of its genuineness, sincerity and no reasonable ground to suspect collusion. In every case, the court has to satisfy itself so far as reasonably can as to whether or not the petitioner has been accessory to or has connived at or condoned the adultery; but if on the evidence the court is not satisfied that the adultery has been committed or if it finds the petitioner has been accessory to or has connived at or condoned the adultery, or that the petition is presented or prosecuted in collusion, the court must dismiss the petition. On the other hand, if the court is satisfied on the evidence that the case for the petitioner has been proved, and does not find that there has been any collusion, condonation or collusion, then it is bound to pronounce the decree of divorce subject to a general discretion based on its consideration of whether the petitioner's own habits or conduct have induced or contributed to the wrong complained of. Frank disclosure of the petitioner's own adultery, if this did not induce a contributory to the respondent's wrong, would not usually deprive the petitioner of a decree, since the discretion which our court exercises to dismiss a petition is not as wide as that given in England under Section 4 (2) of its Matrimonial Causes Act, 1950. An adulterous wife who can be shown to have been a good mother to her children has a reasonable ground of retaining their custody, especially when they are young, unless she sets up some home with the co-respondent or her looseness of character is of a grave kind. That the present or future welfare of the child is paramount has always remained a dominant consideration: the real difficulty in this class of litigation, as in the estimation of the testator's breach of moral duty to his relatives, lies in the wide variance to be found in the matrimonial outlook and background of experience of the individual judge.

5. *Wife's desertion.* Desertion without just cause that has continued for three years is a ground for divorce; desertion without just cause for not less than two years is a ground for judicial separation. For some years we have been troubled over the decision of the Court of Appeal in *Williams v. Williams* (1939) 3 All E.R. 22, that relief could not be given to the deserted spouse when the deserting one had become insane during the period necessary to establish the ground of desertion—a situation that the Master of the Rolls, then Sir Wilfrid Green, said could be put right only by legislation. In South Australia, the Matrimonial Causes Act of 1941 provided

that where a party to the marriage has been deserted by the other party, the desertion shall not be deemed to be terminated by reason only of the mental defect of the deserting party if it appears to the court that the desertion would probably have continued if the deserting party had not become mentally defective. It is expected that a similar provision will be placed on our statute books this year,<sup>1</sup> although where the petitioner could prove that throughout the statutory period the respondent was capable of having an *animus deserendi* the court would, of course, follow the decision of the House of Lords in *Crowther v. Crowther* (1951) 1 All E.R. 1131. For many years, the period of desertion necessary for divorce was five years but in 1919 it became three, and this has been the requisite period since. The court tends towards a liberal view on constructive desertion and has, generally speaking, worked upon the principle laid down in *Sickert v. Sickert* (1899) P. 278, that the respondent must be taken to intend the consequences of his action and, if he treats his wife in such a way as to make it impossible for her to live with him, then he must be taken to intend that she shall leave him, although he may not desire her to do so. Where the circumstances raise the inference that the respondent actually intended to bring the matrimonial consortium to an end, the task of the court is easier; but it seems to me—and this may be due to the fact that husbands' petitions on the ground of constructive desertion are comparatively rare—that less proof of actual intention is accepted in New Zealand than in England.

6. *Habitual drunkenness.* This ground must be accompanied, in the case of the husband respondent, by his having habitually left his wife without means of support or by his habitually having been cruel to her; and, in the case of the wife respondent, by her having habitually neglected her domestic duties and rendered herself unfit to discharge them. It is a ground to which recourse is rarely made and then almost entirely by wives. Since 1913, a wife separated by agreement or order or in any other manner from her husband and habitually and without just cause left by him without reasonable maintenance can claim that he has deserted her wilfully and without just cause for the period during which she has been left without maintenance. This provision (S. 13 of our 1928 Act) has the effect of converting into desertion cases which would otherwise be drunkenness ones. It has to be remembered that habitual drunkenness is a ground for separation under the Desistute Persons Act of 1910, and where the husband is an habitual drunkard the wife usually either has applied to the local magistrates' court for a separation order or has persuaded her spouse, in a moment of maudlin sentimentality, to consent to a mutual agreement for separation.

7. *Murder, attempted murder, wounding or bodily harm.* Although during the past few years this ground has been almost a dead letter, cases of injustice have resulted in the past from the requirement that a sentence of seven years' imprisonment must be imposed where the respondent has been convicted of the attempted murder of the petitioner or of any child of the petitioner or respondent or of the wounding or doing bodily harm to the petitioner or any such child. The leniency of the court on sentence has sometimes deprived the petitioner of the right to divorce, but it is now considered likely that in the proposed amending Act this year the remedy will be given, irrespective of the sentence imposed upon conviction, and in addition the remedy will be extended to include the murder of any person whether a child of the petitioner or respondent or not.<sup>2</sup> The conviction of the respondent for the murder of a child of the petitioner and respondent entitles the petitioner to a divorce. For some years we have not had a petition founded upon this ground.

8. *Unsoundness of mind.*<sup>3</sup> Two separate grounds for divorce can conveniently be considered under this head. These are set out at length in the Appendix as Sections 10 (f) and 10 (g). The features common to both grounds

are that the respondent is a person of unsound mind and that there has been confinement as such in an institution described in the Section. Our Full Court has adopted a definition of unsoundness of mind as being such a kind and degree of mental disorder as would have justified at all times during the statutory period a commitment of the respondent to a mental hospital under our Mental Defectives Act of 1911. If a person enters an institution as a voluntary boarder, he is not regarded as confined "as such" within the Section. In every case where the ground for divorce is unsoundness of mind, there is a duty imposed upon the Solicitor-General to take on behalf of the respondent such steps as he may consider necessary in the interests of the respondent. In a number of Australian States, divorce is obtainable where a spouse is a lunatic or person of unsound mind and has been an inmate of one or more mental hospitals for periods not less in the aggregate than five years within six years immediately preceding the filing of the petition and is unlikely to recover from the lunacy or unsoundness of mind. From time to time, we have been reminded of this lesser period in insanity cases, but have always been opposed to any change, this attitude having possibly a chivalrous basis, since such petitions as are granted on insanity are almost invariably those of husbands and since also a high incidence of insanity in New Zealand in the case of young married women arises from circumstances associated with child-bearing.

9. *Failure to comply with restitution decree.* This has been the most controversial of the grounds for divorce and the subject at times of sharp criticism by Sir Michael Myers, the predecessor of our present Chief Justice, Sir Humphrey O'Leary. It is fairly common knowledge that the present judge, while recognising that there are suits for restitution of conjugal rights that are both genuine and urgent, such as those in which a husband has been left with young children in his case by a wife whose return he sincerely desires, consider that a substantial proportion of suits of this kind, notwithstanding the professed sincerity of the petitioner, are in reality only a step towards the obtaining of a dissolution of marriage and the whitening down or evasion of the three years' period that would otherwise be a condition precedent to divorce where one party remains away from the other wilfully and without just cause. Such suits have been described by judges as "phases detrimental to the dignity of the Supreme Court". Their legislative history itself has been checkered. By the Divorce and Matrimonial Causes Act of 1867, which conferred the first jurisdiction upon the New Zealand courts in matrimonial cases, power was given to determine suits for restitution of conjugal rights. It was not, however, until the Divorce Act of 1898 that failure to comply with a decree for restitution was deemed desertion and the right created for the petitioner forthwith to file a petition for divorce or judicial separation. In 1907 this right was removed by an Amending Act. In the next thirteen years, during which failure to comply did not amount to desertion nor amount to a ground for dissolution, petitions for this form of relief fell into disuse. Between 1910 and 1917, no petitions for restitution were presented at all. In 1920, in discussion in the Legislative Council upon a Bill to restore the right, it was stated that Mr. Justice Edwards had observed that the retention of the existing position would be a blow to morality and it was further stated that the removal of the ground had resulted in regular trade in collusive adultery in order to obtain divorce. The Amending Act of 1920 restored the ground, and a sharp increase in these suits became immediately manifest. The Year Book of 1926 makes reference to the high proportion of cases of divorce based on disobedience of restitution decrees in which the husband, at the time of marriage, was between thirty and forty while the wife was in her teens or in her early twenties. In 1930, the petitions based upon non-compliance showed a ninety-two per cent. increase compared with those of 1928, a normal pre-war year. But busy war marriages and a growing population were both factors in this increase. The matter has been the subject of considerable discussion by delegates from various law societies to the Council of the New Zealand Law Society. The majority have supported the suggestion of the present Attorney-General, Mr. Clifton Webb, that the law should again be changed. On the other hand, the minority are of the opinion that the question is

<sup>1</sup> This has now been effected by Section 4 of the Divorce and Matrimonial Causes Amendment Act, 1953.

<sup>2</sup> This has now been effected by Section 5 of the Divorce and Matrimonial Causes Amendment Act, 1953.

<sup>3</sup> See also footnote 9 to the Appendix, on page 955.

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[Continued]

primarily a sociological one that is not so unsatisfactory as the figures may convey and that there is no evidence that the judges themselves cannot preserve the dignity of the law and of their courts. Of the six Australian States, only one—New South Wales—has provision corresponding with our own that non-compliance amounts to statutory desertion and gives an immediate right to institute a petition in divorce. It is, however, reasonable to assume that the proposed Amending Act this year will abolish the right to petition for a divorce immediately on the failure of the other party to the marriage to comply with a decree for restitution, and that any such failure will be treated as evidence of desertion for the purpose of a petition for divorce on the continuance of that ground for three years or more.<sup>1</sup>

10. *Separation.*<sup>2</sup> The ground for divorce introduced in 1920 and most frequently resorted to in New Zealand is mutual separation either oral or by deed or agreement. There is also the further ground of separation by court order. In the case of any petition based upon separation, whether oral or by deed or agreement or under order of the court, we have provided the safeguard that if the respondent opposes the making of the decree, and it is proved to the satisfaction of the court that the separation was due to the wrongful act or conduct of the petitioner, the court must dismiss the petition. Separation that has lasted not less than three years has resulted in nearly one thousand petitions in divorce annually being presented upon this ground, and it is the only one of the various grounds for divorce where the petitions of wives outnumber those of husbands. I do not know of any evidence that social harm has arisen from this situation. On the contrary, it has had the effect of removing substantially, if not entirely, the stigma from divorce in New Zealand. This is a matter of some moment in a country that, in its moral outlook, still tends to adhere for better or worse to the Victorian traditions. It is also, I believe, of importance in the preservation of better relations between the parties themselves and their children: there are frequently to be found where adultery is put forward as the ground for the divorce. During the years from 1936 to 1944, the average duration of the marriage (where a decree absolute was made in a separation suit) was fifteen years, so that if the marriages were tried and found wanting, at least they were tried for a reasonable period before being brought to an end. In their procedural aspect, divorces based upon separation are not unwelcomed by the judges who, in the two largest centres, Auckland and Wellington, frequently deal with thirty or more undefended suits in a day set aside for the hearing of these cases. Proof of the deed, agreement or court order is almost invariably regarded as sufficient without the necessity of tendering evidence upon the causes or differences that brought about the separation. More proof is required where the petition is founded upon an oral agreement by mutual consent. Where one party says, "I've had enough and I'm going", the other retorts, "Go, and good riddance to bad rubbish", it is not altogether easy to know whether this situation, recollected three years or more later, amounts to an agreement for separation or a mere acquiescence in an act of desertion. The question as to whether an implied or inferred agreement falls within Section 10 (6) of our Act of 1928 was expressly left open in *Ducker v. Ducker* (1951) N.Z.L.R. 583, and it is to be hoped that it will shortly be settled one way or the other, the matter being really so appropriate one for legislation. One feature of divorce based upon separation by court order calls for passing mention. The husband against whom such an order has been made frequently finds himself in a difficulty in seeking his freedom since the wife can rely upon the order in support of her contention that the separation was due to the wrongful act or conduct of the petitioner. The court is entitled to have regard to the *de facto* termination of cohabitation which may precede the making of the order, but this does not remove the difficulty that the order to be validly made must result from wrongful acts or conduct. The effect of this situation is that magistrates' courts have required a more stringent proof upon such matters as habitual drunkenness, cruelty or failure to provide than was the case before 1920.

11. *Rape, etc.* These grounds for divorce do not require any comment. In the years 1949, 1950 and 1951, there was only one petition based on rape and one on the other offences mentioned in this Section.

12. There are four other matters upon which I wish to touch briefly. These are set out in the following paragraphs.

13. *Nullity.* In 1949 a recommendation was made to the Council of the New Zealand Law Society that our law should be altered to conform to the changes made in nullity by the English Act of 1937. The matter was carefully considered by the various district societies and eventually the Council came to the conclusion that it should not itself express any opinion upon the matter but the matter was one of such importance that it should promptly be submitted to the Law Revision Committee which, in matters of divorce, consisted of the Solicitor-General (Mr. H. E. Evans, Q.C.), Mr. H. G. R. Mauns, Q.C., a former Attorney-General, and Sir Wilfrid Jenkinson, Q.C., the author of the accepted work in New Zealand upon divorce law and practice. Lengthy consideration was given by that Committee to the matter and legislation has now been drafted to bring our law in conformity with its recommendations, which are (i) that a marriage shall be void *ab initio* (a) where at the time of the ceremony either party was already married or (b) where the marriage was induced by duress or mistake or (c) where it was between persons within the prohibited degrees of relationship or (d) where it was not solemnised in due form, (ii) the marriage is to be voidable on any of the grounds now accepted as new law in England and embodied in Section 1 of the Matrimonial Causes Act, 1950, and subject to the provisions of that Section. The proposed legislation also preserves the legitimacy of the children of a voidable marriage, as if the marriage had been dissolved, and not annulled, at the date of the decree for nullity. This draft legislation is expected to become law during the present year.<sup>3</sup>

14. *Conciliation.* This question has been under consideration, but the view is generally held—and it is one that I believe is shared by our judges—that while we are favourably disposed to the adoption of any machinery that might make for reconciliation, we are not altogether averse to attempts at reconciliation in divorce suits in the Supreme Court would be attended with the same success as has been achieved in the magistrates' courts. It has to be remembered that, as I have pointed out earlier, the main ground for divorce in New Zealand is acquiescence by agreement, deed or court order, and based upon a factual separation of three years and upwards, and when the time arises for the institution of the petition reconciliation is most unlikely.

15. *Protection of deserted wives.* It is thought likely that in the amending legislation this year the court will be authorised, in its discretion, where a decree for divorce or nullity of marriage or judicial separation or restitution of conjugal rights has been made, to vest in the husband or wife the tenancy of any dwelling-house that is held by the other spouse and in which either of the parties resides. Except for the change of tenancy the rights of the landlord will not be affected and wide rights of appeal in this branch will be created by the legislation.

16. *Period between decree nisi and decree absolute.* We have always been inclined to think that the period of six months which, from 1856 to 1946, was the normal one prescribed in England was too long and that, on the other hand, in reducing the period to six weeks the Decree Committee went too far in the opposite direction. The reasons for this view are that in New Zealand the facilities for obtaining a divorce after only a short period of married life have been greater than in England, because in New Zealand a divorce can be obtained very soon after marriage on the ground of failure to comply with a decree for restitution of conjugal rights. It is thought that in New Zealand it would be undesirable to add to a very short period of married life an unduly short period during which reconciliation might take place. There is not in New Zealand, as in England, the restriction upon the presentation of a divorce petition during the first three years of marriage. The only condition precedent for

<sup>1</sup> By Section 8 of the *Divorce and Matrimonial Causes Amendment Act, 1953*, the failure to comply with the decree for restitution of conjugal rights is required to have lasted for three years or more.

<sup>2</sup> See also footnote 3 to the Appendix, on page 955.

<sup>3</sup> This has now been effected by Section 3 of the *Divorce and Matrimonial Causes Amendment Act, 1953*.

<sup>4</sup> This has now been effected by Section 14 of the *Divorce and Matrimonial Causes Amendment Act, 1953*.

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our Act imposes is a domicile of at least two years preceding the presentation of the petition. Furthermore, the almost complete cessation of newspaper reports of undefended divorce cases makes it necessary that ample time should be allowed to interested parties to hear of the decree nisi and to enable them, if they so desire, to approach the Solicitor-General with a view to intervention. In this respect he exercises functions similar to those of the Queen's Proctor. From 1938 onwards, it has not been possible for our courts to make a decree nisi absolute in less than three months and, although the court has power to fix a longer period, three months has in fact been invariably in practice the period that has been fixed. As the result of further recent discussion upon this matter, it is now thought likely that the Amending Act this year will alter the relative Section to enable the court by special order in a particular case to shorten the period to one of not less than six weeks.<sup>4</sup>

(Dated March, 1953.)

## APPENDIX

Grounds of divorce in New Zealand under the Divorce and Matrimonial Causes Act, 1928, \* as amended by the Divorce and Matrimonial Causes Amendment Act, 1935.

## (1) Section 10 (a)

That the respondent has been guilty of adultery since the celebration of the marriage:

## (2) Section 10 (b)

That the respondent without just cause has wilfully deserted the petitioner, and without just cause has left the petitioner continuously so deserted for three years or more:

## (3) Section 10 (c)

That the respondent has for four years or more been an habitual drunkard, and has either habitually left his wife without means of support or habitually been guilty of cruelty towards her; or, being the petitioner's wife, has for a like period been an habitual drunkard, and has habitually neglected her domestic duties and rendered herself unfit to discharge them:

## (4) Section 10 (d)

That the respondent has been convicted of and sentenced to imprisonment for seven years or more for attempting to commit the murder of, or wounding or doing actual bodily harm to, the petitioner or any child of the petitioner or respondent:<sup>5</sup>

\* This has now been effected by Section 11 of the Divorce and Matrimonial Causes Amendment Act, 1953.

<sup>1</sup> Since Mr. Leicester submitted his memorandum, the Divorce and Matrimonial Causes Act, 1928, has been amended by the Divorce and Matrimonial Causes Amendment Act, 1953. Besides the amendments which have already been noted in previous footnotes to the text of the memorandum, there are other amendments the most important of which add two further grounds of divorce. The text of these is as follows:—

Section 10 (ea) That the respondent is a person of unsound mind and is unlikely to recover, and has been confined as such in New Zealand in an institution within the meaning of the Mental Defectives Act, 1911, or in a like institution in any other country of the British dominions, for a period or periods not less in the aggregate than seven years within the period of ten years immediately preceding the filing of the petition:

Section 10 (j) That the petitioner and respondent are living apart and are unlikely to be reconciled, and have been living apart for not less than seven years:

## (5) Section 19 (e)

That the respondent has been convicted of the murder of a child of the petitioner or respondent:<sup>6</sup>

## (6) Section 10 (f)

That the respondent is a person of unsound mind and is unlikely to recover, and has been confined as such in New Zealand in an institution within the meaning of the Mental Defectives Act, 1911, or in a like institution in any other country of the British dominions, for a period or periods not less in the aggregate than seven years within the period of ten years immediately preceding the filing of the petition:

## Section 10 (g)

That the respondent is a person of unsound mind and is unlikely to recover, and has been continuously a person of unsound mind for the period of seven years immediately preceding the filing of the petition, and during the final three years of the said period of seven years has been confined as such in New Zealand in an institution within the meaning of the Mental Defectives Act, 1911, or in a like institution in any other country of the British dominions:

## (7) Section 10 (h)

That the respondent has failed to comply with a decree of the Court for restitution of conjugal rights:<sup>7</sup>

## (8) Section 10 (i)

That the petitioner and respondent are parties to an agreement for separation, whether made by deed or other writing or verbally, and that such agreement is in full force and has been in full force for not less than three years:

## (9) Section 10 (j)

That the petitioner and respondent are parties to a decree of judicial separation made in New Zealand, or to a separation order made by a Stipendiary Magistrate in New Zealand, or any decree, order, or judgment made in any country if such decree, order, or judgment has in that country the effect that the parties are not bound to live together, and, further, that such decree of judicial separation, separation order, or other decree, order, or judgment is in full force and has been in full force for not less than three years:

## (10) Section 10 (k)

That the respondent, being the husband of the petitioner, has been guilty of rape or of sodomy or of bestiality since the celebration of the marriage.

<sup>4</sup> See footnote to paragraph 7 of Paper No. 121, on page 953.

<sup>5</sup> See footnote to paragraph 9 of Paper No. 121, on page 954.

## EXAMINATION OF WITNESS

(MR. W. E. LEICESTER, a member of the New Zealand Bar; called and examined in private.)

9282. (Chairman): We are very grateful to you for supplying us with the memorandum and for coming to help us. Might I just for the record state how your presence here came about? When we saw certain New Zealand legislation about divorce we thought it would be very helpful if possible to get one or more witnesses from New Zealand, and the Secretary communicated with New Zealand House and enquired whether any members of the Bar or Bench of New Zealand were coming over here. They reported that Mr. Justice Finlay and yourself were coming and I think they got in touch with you, did they not, and asked whether you would be prepared to give

evidence?—(Mr. Leicester): Yes, the Under-Secretary at the Justice Department saw me and said he had had a request from the Commission that if a New Zealand barrister experienced in divorce matters were coming here the Commission would like to have the opportunity of hearing what he had to say about New Zealand divorce. I should like to have the opportunity of making it clear that I have not set myself up as an expert in New Zealand divorce nor as an authority upon it, but merely as one who over the years has had a good deal of experience in different phases of New Zealand divorce law.

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[Continued]

9283. That leads me to the first question I was going to ask you. I see that you say in paragraph 1:—

"I am now senior partner in a firm of four partners. Two of us confine our activities for the most part to the work done by barristers in England, while the other two carry on such work as solicitors normally do in England."

To which two do you belong?—I am one of the two barristers. Most of my work is in the courts.

9284. And has your firm a fair proportion of divorce work?—My firm, I should think, has one of the largest divorce practices of the firms in Wellington, Wellington being the capital city, but actually the proportion of divorce cases is greater in Auckland, which is slightly larger in population and which is perhaps more American in outlook than some of the other New Zealand cities.

9285. Would you look at paragraph 2, where you say:—

"Of all the parts of the British Empire, New Zealand has, I think, the most liberal divorce laws, and this may be due to the fact that we are a primary producing country and expansive legislation has not been the least of our primary products. In much of this legislation we have striven to remedy grievances rather than to achieve theoretical perfection."

As I understand it, your attitude has been rather, here is a hardship, let us remedy it if we can?—Yes, I think that is substantially correct. I bear in mind as an illustration the 1930 amendment to our divorce legislation, where we made three years' residence sufficient to enable the woman to found a petition for divorce. The reason why that came about was that a few years before we had had a visit from the American fleet and a number of the seamen in that fleet had married New Zealand girls who had found the marriage unsatisfactory and in many instances disastrous. It was then discovered that there was no adequate or suitable ground for divorce they could bring in the State in which these seamen had domicile in America, so these young women were left without a remedy. I think that under pressure on our legislators the divorce amendment was passed, although in legal circles it was thought that it was going a long way in making residence, as opposed to matrimonial domicile, the condition precedent upon which the divorce would be allowed. That is one illustration. I have other illustrations which I think might be brought where Parliament has been prevailed upon by certain Members, in cases of hardship, to have alterations made to the divorce laws.

9286. Then, in the next sentence, you say:—

"In the past seventy years, various Ministries have tended to regard New Zealand as the world's social laboratory, and the search for policies of broad humanitarianism, backed up by fifty years of women's franchise and women's organisations of an astonishing number and variety, and to be found in every part of the Dominion, has resulted in the gradual widening of the grounds for divorce."

I think it is true to say, as far as my observation goes, that here the greater part of the agitation for widening the grounds of divorce has come from men. I have been asked to put this question by one of the members of the Commission—have women's organisations in New Zealand agitated for or helped to bring about wider grounds for divorce, or has it been rather the men's organisations?—I should think that the answer would be, for the most part women's organisations, pressure from women's groups. I should say that, generally speaking, the men in New Zealand have been largely indifferent over the years to alteration in the divorce law. As an illustration of that, I would give a proposed amendment to the ground which has permitted divorce where a man has been sentenced to seven or more years' imprisonment for the murder of, or doing bodily harm to, a child, to meet the difficulty that where the sentence has been less than seven years, the court has found itself unable to grant a decree of divorce. In that respect, to my own knowledge, pressure has come from women's groups and not from any men's organisations.

9287. That would be inevitable, would it not, because the men are the people in prison, and they are the only people who can be divorced? It would in that case naturally be women's organisations which agitated for it.

You cannot imagine men's organisations agitating for it, can you?—I think that is true in that particular instance, although if the rare case happened of a woman being imprisoned on that ground, a similar remedy would be open to the husband—I do not know of any such case. Going back to 1920, when we commenced divorce by separation, I cannot speak of my own knowledge because at that time I was a law clerk and not particularly interested in any legislative changes, but I would be inclined to think from my knowledge over the years that a good deal of pressure to have divorce on that ground arose from these women's groups which have always been very alive in New Zealand, particularly in farming communities.

9288. That surprises me a little, for in this country it is rather the men who agitate and say, "Let us have divorce on the ground of separation", in some cases because they have gone off with another woman, whereas the women, I think, in the majority of cases, have been rather against it. However, that was not so in New Zealand as far as you are aware?—No, in New Zealand the greater proportion of divorces on the ground of separation are brought by women, women petitioners outnumber men quite considerably. In the case which you illustrate of a man who had gone off with another woman and who wanted to have his right to freedom by reason of separation, were that case to happen in New Zealand it would be perfectly open to the wife to set up, under Section 18 of the New Zealand Act, that the separation had been brought about by the wrongful action of the husband, and if that fact were established I would say that the divorce would be refused.

9289. If the petitioner was found to be responsible for the break-up, is the judge not bound to refuse the decree?—He must dismiss the petition. I think that the wording is, if "it is proved to the satisfaction of the Court that the separation was due to the wrongful act or conduct of the petitioner, the Court shall dismiss the petition".

9290. That is why I was puzzled by your saying that "the divorce would be refused". The court would be bound to dismiss the petition, would it not?—Perhaps it was a cautionary statement, I did not want to make too absolute a statement. But, as you put it, if it was proved to the satisfaction of the court, the court must dismiss the petition. The idea I had in mind was that it does not necessarily follow that because that defense is set up the respondent will always be successful.

9291. I follow that. You say:—

"In so far as public morality, in relation to divorce, has been discussed during this legislative process, emphasis has been laid upon the immorality that results, not from the making of divorce easier, but from the retarding of the shadow of marriage where the substance has ceased to exist."

The attitude there, as I understand it, is that if people get on well together, well and good, the marriage is a success, but if they do not, why keep them tied together? Is that the attitude, roughly speaking?—That attitude is manifest in certain decisions of our courts, *Morris v. Morris* being one of them. That case has been referred to over the years by different judges, judges who believe that if the fact of separation has been established and that separation has continued for three years they should not put too fine a point upon it in refusing the petition of divorce. In other words, it is felt that it is not immoral to keep a person tied to a marriage that is set in fact a marriage that to give him his freedom. Might I just qualify that statement with this observation, that some of our judges have not gone quite as far as that? In other words, some of the judges bring an individual viewpoint to bear and have not been prepared to go as far in this respect as other judges, but the majority of judges take, I believe, the view which is expressed here.

9292. I come to the next sentence:—

"Sociologically, at least so far as New Zealand is concerned, there is no proof that the liberality of our ideas in divorce has brought about anything but good."

Could you tell me, first, what sociological results you have personally observed from the making of divorce easier? Would I be right in thinking that they are the results which are described in paragraph 10?—I had in mind two results, from personal experience over a number of years. The first was that of my own knowledge I

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[Continued]

know of many cases where young people have married and found that they were foolish in so doing, and where they have re-married and had families and individually led happy lives. Secondly, from my own personal experience I have found that where the ground for divorce is separation the parties have remained on good terms after the separation, and the children have derived innumerable benefits when it comes to the divorce from the fact that the period during which their parents have been apart has not widened their differences.

9293. I think that is mentioned later on in my memorandum. I have a question to ask about it. Of course it is a fact, is it not, that divorce have increased very greatly in number since 1927?—Yes.

9294. I suppose you would agree that the separation ground, whatever its advantages, has led to a substantial increase in the number of divorces?—I should think so. I should think that was undoubtedly a factor, and of course the population has been increasing in my country.

9295. But I understand from the figures that the increase in divorce has been much greater than the increase in population?—I should agree with that.

9296. In paragraph 9 you deal with this particularly interesting question as to failure to comply with a decree for restitution of conjugal rights. You say:—

"This has been the most controversial of the grounds for divorce and the subject at times of sharp criticism."

I will not take you through all you have said, but you point out:—

"It was not, however, until the Divorce Act of 1898 that failure to comply with a decree for restitution was deemed desertion and the right created for the petitioner forthwith to file a petition for divorce or judicial separation. In 1907 this right was removed by an Amending Act. In the next thirteen years, during which failure to comply did not amount to desertion nor amount to a ground for dissolution, petitions for this form of relief fell into disuse. Between 1910 and 1917, no petitions for restitution were presented at all."

Then you say a little further on:—

"The Amending Act of 1926 restored the ground, and a sharp increase in these suits became immediately manifest."

It seemed to me that those two passages showed that this form of petition was in reality what is described as "only a step towards the obtaining of a dissolution of marriage and the whittling down or evasion of the three years' period".—In the main, I think a sheet-out to divorce, although the judges themselves recognise that there are cases from time to time where the petitioner genuinely wants a decree for restitution and nothing more. One such case is the case of a woman who desires to punish her husband by obtaining a decree of restitution and, if I might relapse into the colloquial, sitting on it, so that he cannot do anything as the years go by. He is at fault because he has left her without reasonable cause. He has no means of getting a divorce and she sits on her right. We have recognised from time to time that there is some advantage to a woman in taking a decree for restitution because under our Act she has certain maintenance rights which are wider than the maintenance rights which she would have before a magistrate.

9297. I can see that there might be individual cases where it served another purpose, but when one finds that between 1910 and 1917, when a divorce could not be obtained by this means, no petitions for restitution were presented at all, it looks as if it was in reality, broadly speaking, only a step towards the dissolution of marriage or the whittling down or evasion of the three-year period—to quote from your memorandum?—Yes, the case is known to the profession where one spouse has said to the other, "You leave me and I will get a decree for restitution and you do not comply with it, and I shall then apply for a divorce". A divorce can then be obtained on the ground of a statutory desertion within perhaps a period of nine months or a year.

9298. In the same paragraph you say that the question whether you should retain the present position:—

"... has been the subject of considerable discussion by delegates from various law societies to the

Council of the New Zealand Law Society. The majority have supported the suggestion of the present Attorney-General, Mr. Clifton Webb, that the law should again be changed."

That would have the result of doing away with this easy ground of divorce?—It would entitle the petitioner to obtain a decree for restitution, but the effect, I think, would be to make such a decree possibly the commencing point of a period of desertion.

9299. Three years?—Or, alternatively, it would found the right to obtain a decree for judicial separation.

9300. Putting it shortly, the result of the change of the law would be that this short-cut to divorce would disappear?—We would return to the position as it was in 1907 and which existed for the next thirteen years.

9301. Then your memorandum goes on:—

"On the other hand, the minority are of the opinion that the question is primarily a sociological one that is not so unsatisfactory as the figures may convey. ..."

In other words, the minority would rather keep it as it is?—I would like to answer that by saying that the minority were not impressed by an occasional outlier from the Bench in an individual case that the Bench was not satisfied with the petition; they thought that the case here and there did not necessarily establish that the ground was bad.

9302. Which side would you support, or do you support, if I may ask?—I should think that the weight of evidence favoured the view that is taken by the Attorney-General and shared by a number of judges.

9303. You do not want to say what your own view is? Do not if it is an embarrassing question. As these really are your own views, as you say very properly at the beginning of paragraph 2, I would be interested just to know your own view, whether you would agree with the majority or the minority?—Since you ask for my own view, which I had not altogether expressed under this particular heading, I am inclined to think that the position might almost be met by a compromise viewpoint in the way of judges tightening up, as it were, in granting these decrees for restitution, bearing in mind that the effect of that decree would be to enable the party who got it to petition for divorce, and in being more astute, if I may use the term without offence, in seeing that the petitioner is sincere, and in endeavouring to probe whether in reality the petitioner wants a decree for restitution or wants to make it a step for divorce. I am not personally altogether satisfied that the judges, by being too easy in letting these cases through, have not to some extent precipitated this situation.

9304. It is difficult for a judge to know whether a petition is being presented for the one reason or the other, but you say they ought to probe, and I quite understand that. I want to come now to where you say, about the ground of separation:—

"I do not know of any evidence that social harm has arisen from this situation. On the contrary, it has had the effect of removing substantially, if not entirely, the stigma from divorce in New Zealand. This is a matter of some moment in a country that, in its moral outlook, still tends to adhere for better or worse to the Victorian traditions."

I think I know what you mean by the Victorian traditions, but would you mind telling me what you had in mind when you said that the country, although you have told us that it is so progressive in the matter of the divorce law, still tends to adhere to the Victorian traditions?—What I mean to convey (and this again is entirely my own view) is that in my younger days to some extent a divorced woman, no matter what position in New Zealand society she occupied, lost caste by being divorced, whether she was the person who obtained the divorce or whether she was the person who was divorced. Over the years, through my own personal practice and from the extent to which I have had social relations, I am inclined to think that the public—or perhaps I should

<sup>22</sup> See footnote to paragraph 9 of Paper No. 121, on page 954.

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[Continued]

any society—has come to take the view, where people have tried to get on together and cannot and have separated and then one or the other has obtained a divorce. "Well, it has been a misfortune that they have not got along better but they have done the right thing, the wise thing". Consequently, after divorce, a woman does not lose nearly to the same extent the standing she may previously have had. It is a little difficult perhaps to convey what I had in mind, but that illustrates it. I might illustrate the use of the words "adherence to the Victorian traditions" by referring to another phase of life, the illegitimate child—which can happen in all phases of society. In New Zealand a girl who is unfortunate enough to have an illegitimate child even today has largely lost any position in the particular society in which she mingles, no matter what that society is. Perhaps I can draw a distinction between the persistence of the Victorian tradition in regard to illegitimacy and the difference in respect of divorce—thirty or forty years ago a divorced woman was not accepted by the same people as accepted her before divorce; today it makes little or no difference.

9305. I suppose it is a matter of weighing the advantages and disadvantages. Nowadays in New Zealand anyone can get a divorce by consent after a three-year delay, and that no doubt enables misfits to end their marriage and to seek fresh partners with whom they may be more happy—that may be a good thing. On the other hand, marriage becomes more of a try-out and less of a bond for life, does it not?—I have had that point you have made put to me on several occasions since I have come to England, and I think that postulates a sort of understanding prior to marriage or at the time of marriage that "if we cannot make a do of it we can always get a divorce". From my own experience, and I feel sure I am speaking for a large number of others, that does not in reality prove to be the position. There may be an isolated case where such a situation is discerned, but it would take a lot to convince me that in the average case or anything like the average case the parties considered this question of separation at all. In other words, I do not believe for a moment that in perhaps more than one case out of twenty the parties say to themselves, "If we cannot make a do of it we will separate". It is something which arises after marriage and not at the time of marriage or before it.

9306. I do not think it is suggested that they actually put it into words or discuss it, but rather that it is a subconscious feeling. Seeing that people can change partners without any undue trouble, there is a subconscious feeling that this is not necessarily a life sentence, so to speak. Do you not think that it has that psychological effect on young people before they get married?—For my own part I would with respect disagree that any such view does exist.

9307. Another thing that is suggested is this: that perhaps when people can get free so easily, then whether they want to change partners or not, they are not quite so likely to try so desperately hard to get over all those little troubles—perhaps they may stem big at the time—those troubles which arise in married life. It is suggested that if divorce is more difficult, people who are beginning to drift apart, or who are finding married life difficult, are more apt to dig their toes in and say, "We shall make a success of this", than if they feel that divorce is easy, more especially perhaps if they are attracted for the moment by someone else. What do you say to that, does it not have that effect?—I suppose that over a period of thirty years it is hard to estimate how many of these cases one has handled or been associated with, but I think in my own case it would run into many hundreds, and I would think that there was barely one where I found that the parties who wished to get free on the ground of separation had not really tried to make a "do" of their marriage. I have not personally had any real evidence that the parties were influenced not to try because they had this remedy at hand. I think that only after a real trial have they resorted to the remedy.

9308. Coming to your next sentence:—

"It is also, I believe, of importance in the preservation of better relations between the parties themselves and their children than are frequently to be found where adultery is put forward as the ground for the divorce." There, I understand, you are speaking of the case where people do get a divorce and after it, if it is on the ground of separation, the relationship between the children and

the parents is better than it would be if it had been on the ground of adultery?—Yes, I mean that, and I should say that where most is made to this particular ground and children are involved, the parties have for the most part regulated questions of interim custody and the like by means of some mutual understanding or custody arrangement by deed or agreement, which has persisted, usually successfully, over the years. When it comes to the time for divorce the parties are usually quite ready to discuss the continuance of that particular arrangement, or if boys are involved the fact that the father should have a greater share in the up-bringing of the boys and their education and the like. Whereas, in adultery suits, which usually arise more suddenly and where there is a good deal of bitterness between the parties, one does not find there is the same ease in dealing with this very difficult question of custody.

9309. One can well appreciate that. If both parties wish to separate and wish a divorce there is not so much ground for dispute between them about the divorce or the arrangements preparatory to it—that would seem to follow almost inevitably, would it not?—That does not always follow, Sir, because over the three years, particularly with the less well-to-do, circumstances so very often change; the maintenance may not have been paid or the women may be in a much better position to maintain the children than the husband, or various factors may arise where there is not as much readily available to maintain the children.

9310. I quite appreciate that these factors may come in later, but what I am saying is that one would naturally expect that where two people wished to separate and ultimately to be divorced, there is less ground for ill-feeling than if one goes off and commits adultery. It is surely obvious that that would be so?—Yes, I agree with that.

9311. Your next sentence says:—

"During the years from 1936 to 1944, the average duration of the marriage (where a decree absolute was made in a separation suit) was fifteen years, so that if the marriages were tried and found wanting, at least they were tried for a reasonable period before being brought to an end."

I wondered if you could cast any light upon the situation after 1944? I will tell you why I particularly wanted to know that. The peak years for divorces—I have the figures before me—were 1945, 1946 and 1947, and I did not know whether in those later years, when the 1920 law had been in operation for quite a while, people tended to get a divorce on the ground of separation after rather a shorter period of marriage. Could you throw any light on that?—I am sorry, Sir. I have not got the information for the years subsequent to 1944, but I feel sure that some fuller information on those later years is available and I should be only too pleased to obtain it if it would be of any assistance to the Commission.

9312. You see my point, that it is the recent years which have been the peak years and also the time when people have grown up to be used to this idea of divorce by separation. I thought it would be interesting to know what the average duration of marriage was in those subsequent years.—The reason I have not given it for later years is that for some reason or another the Justice Department took up the figures for those particular years and, as far as I know, the figures have not been taken up since, but I think some fuller information could be obtained on that.

9313. I should be very grateful if you could get it. [See Papers No. 122 and 123.] There is one other point. You say:—

"In their procedural aspect, divorces based upon separation are not unwelcome to the judges. . . ."

I do not quite see what you mean by that. What do you mean by "not unwelcome to the judges"? They sit there to try whatever cases the law brings before them.—What I mean by that is this, that these divorces, if they are undefended, tend to fall into a pattern, and the pattern is this: that instead of having to go in great detail into the causes that have brought about the unhappy relations between the parties, or the causes of the breakdown of the marriage, the court is usually satisfied on some general question, "The marriage proved unhappy, and what was then done?" The petitioner then explains that he or she entered into a deed or agreement for separation, or was compelled to get an order of the

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court, or they discussed the matter orally and decided to separate, and from that point on, from the point of view of proof, the court is then concerned with the continuity of the separation—has it persisted for three years?—on respect of which some corroborative evidence is usually required, and subject to proof on those three matters the decree is usually made. So that from the point of view of the Bench, which is required to deal with thirty or forty divorce cases in a day in the larger centres, this type of case is not unwelcome in the sense that it does not take any great period of time and the proof is more stereotyped.

9314. The judges can run through the cases quicker, with less trouble, is that it?—Yes.

9315. Mr. Young wants to ask you later on about the defended cases in these separation cases, and I will leave that to him. My only other question occurs on paragraph 16—this again is a question I was asked to put. You say:—

“The reasons for this view are that in New Zealand the facilities for obtaining a divorce after only a short period of married life have been greater than in England, because in New Zealand a divorce can be obtained very soon after marriage on the ground of failure to comply with a decree for restitution of conjugal rights.”

So that in New Zealand you have gone as far as this, that you can get divorce for failure to comply with a decree for the restitution of conjugal rights without waiting for three years, and you have also got divorce by consent after three years. That being so, I suppose that there is not an agitation to make divorce still easier, is there? Are there people who do not think you have gone far enough yet?—I would not say an agitation, but it has been suggested in New Zealand in recent years that a two-year separation period would be sufficient. That is only a recollection of some correspondence on the subject. I do not think that it ever amounted to an agitation. On the first issue to which you referred, the question of divorce based on failure to comply with a decree for the restitution of conjugal rights, I should like to make it perfectly clear that the reputable advocates in New Zealand would not dream of taking a case by way of restitution where he had any reason to feel satisfied that it was a mere subterfuge. But where he has no more than the statement of the one party that the other, without any real cause, has left him or her and that party requires a decree for restitution, he considers that it is a matter for the court to feel satisfied or otherwise as to whether the decree should be granted.

9316. I quite follow that, and of course I need hardly say I was not casting any reflection on practitioners in New Zealand. It was only that, as divorce had been made so easy, I wondered whether there was any desire to have it made still easier. You do say that there are people who are saying that the period of separation ought to be reduced to two years?—Yes. May I just add this with your permission? Although I have every reason to believe there are many practitioners who hold the same views as I do, the views that I put forward are coloured very much with my professional life and have not got the religious basis which no doubt has been put before this Commission by others, and those holding stronger views of a religious aspect no doubt might very well in New Zealand take a different view from that which I put forward.

9317. (Mr. Young): I take it that your experience would be the same as ours, that your divorce rate went up considerably as a result of the war?—Yes, as in England, after the war there was a very large increase in divorces, both in respect of separation and of adultery, by reason of hasty marriages brought about by war conditions.

9318. You have had that experience too?—Yes, it was very marked.

9319. It is very interesting to see that you have this fusion of the two sides of the profession in New Zealand. You have said that you do the barrister side of the work. Do you handle the case from the beginning?—It may happen that because one has been personally recommended or because one is known to the client, the client will come to one direct, in which case one might take the initial instructions shortly, or perhaps, in certain cases, at length. Counsel would almost invariably discuss the case with the client before the case was heard. But in

most cases, particularly in undefended divorces, the usual practice is for a solicitor or a clerk in the firm to take the instructions and to pass on a memorandum of those instructions to the barrister. But we do act both as solicitor and as counsel and, as I have said, in cases where the client comes to one on some personal recommendation or for a personal reason one probably makes a memorandum.

9320. What I really wanted to ask you, arising out of this, was whether you thought that there was much chance of reconciliation at the point when people come to you?—I think that in some instances, in the case of young people, practitioners are inclined to go out of their way in New Zealand to endeavour to keep the marriage intact. I have known many cases of that. But where people who have reached an age where they are able to form their own judgment come to a practitioner and it is found they have been at arm's length over a period of three years, I think the average practitioner would deem it a presumption at that stage to suggest reconciliation.

9321. Do you have in New Zealand marriage guidance councils, probation officers and so on?—We have marriage guidance councils but they usually operate at some earlier stage than actual separation. Sometimes the magistrate will send the parties to get advice from one of these councils. One of our judges, in a case last year where young people were involved caused a great deal of discussion in the profession by refusing to grant a decree of divorce until the parties had seen one of these marriage councils, although the grounds asked, there had been continuous separation for three years. It was thought by some of the profession that he had gone further than he should have done in the circumstances.

9322. Are you of opinion, from your experience, that the fact that you have many grounds of divorce has not in any way weakened the marriage tie?—My answer is that it has not.

9323. Have you any view as to whether there should be a limitation of the right to divorce if there are children under a certain age?—My own personal view is that subject to the court being satisfied as far as it can be that the welfare of the children is preserved, I see no reason why, if the grounds exist, one party should be granted a divorce because the children are over a certain age and another refused it in similar circumstances because there are younger children. I personally would not subscribe to any differentiation on that account.

9324. Has there been any agitation in New Zealand for it?—I know of none based on that precise ground.

9325. I had intended to ask you if the period of three years' separation was not too short, but you have answered that by saying that there is an agitation that it should be reduced to two years.—Yes, I wanted to make it clear to his Lordship that I would not describe it as an agitation but a suggestion, nor do I want to give the impression that that view was necessarily widely held. I think I would answer what you say by saying this: that the three-year period is accepted as being a sufficiently long period and I have not heard any criticism that it is too short.

9326. (Chairman): Nobody has suggested it is too short, but some people have suggested it is too long?—I think that is the answer to the question.

9327. (Mr. Young): Are many cases which are brought on the ground of separation defended on the ground that the separation was due to the wrongful conduct of the petitioner?—I should say that of the defended cases in New Zealand, eighty per cent. are cases where the ground of divorce is separation. The judges over the years have had a tendency to widen the ground for defence; in other words, they are prepared to consider as a defence any form of conduct, it need not necessarily be a recognised matrimonial offence such as drunkenness or habitual cruelty or failure to provide. If I may put it shortly, anything which in the view of the community would be regarded as dishonourable conduct in matrimonial life is regarded as a reasonable ground for defence in cases of this sort. May I illustrate this? If a husband makes a habit of taking a young woman out to the moving pictures or to dances against the objection of the wife, there is no proof of misconduct, but if this conduct persists and the wife feels the position keenly and is criticised by her neighbours because her husband does not go out with her but with the young woman, and if the wife were able to establish that as a result of the persistence of that

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conduct a separation had been brought about because she could not put up with it any longer and the atmosphere of the home was strained and miserable, the court would be very ready to find that she had a ground of defence and to refuse the petition.

9328. It would almost come to this then, that the attitude of the court is that if the respondent objects to the divorce it is ready to find a reason?—I think that that is putting it a little broadly. The court is anxious to find out, in a defended case, where it has the opportunity of so doing, what the real ground for the separation was. If the court is satisfied that the respondent tried to make a "do" of the marriage and that it was the fault of the petitioner that it broke down, that the breakdown was due to conduct on the part of the petitioner which, matrimonially regarded, was dishonourable, then the court is ready to refuse the divorce.

9329. Although the conduct was conduct short of a recognised matrimonial offence?—Yes.

9330. Can you give me any idea of the percentage of these separation cases which are defended on these lines?—I should say ten to fifteen per cent.

9331. As high as that?—Yes.

9332. The evidence which is led by the respondent is led after the lapse of at least three years. Do you find that it is sometimes difficult for a respondent at that point of time to be able to prove this defence?—Yes, I think that is a procedural difficulty. Witnesses disappear or become reluctant after that period of time to be involved in somebody else's matrimonial misdoings, and I have no doubt that is a proportion of the defended cases the respondent does suffer from that difficulty. There is, of course, also the factor which I mentioned earlier to his Lordship, that where a court upon full consideration of the case thinks that the marriage has been a hopeless one and there is no reason for keeping it alive, there is a tendency on the part of some judges to regard it as more immoral to preserve such a marriage than to give an erring petitioner the right to freedom. It is a little difficult to generalise on this particular matter with any feeling of confidence.

9333. We have certain evidence before us suggesting that we might follow the New Zealand law whereby a divorce is refused if the separation was due to a wrongful act on the part of the petitioning spouse. Another viewpoint, however, is that the divorce should be refused if the respondent spouse simply comes forward and objects to it. You see the difficulty?—Yes.

9334. In the former case there is this difficulty of evidence, that is why I have been asking about that. But in the second case the question of evidence would not arise at all. Has it ever been suggested in New Zealand that the defence should be limited solely to an objection by the respondent and that it should not be necessary to prove wrongful conduct on the part of the petitioner?—No, an objection is clearly not sufficient. No such suggestion has been made. There have been objections from time to time by women respondents that the husband was re-married if he gets his divorce and have another family and that from the point of view of maintenance she will be worse off. The court has said that that would be unfortunate but that the husband has a statutory right to ask for a divorce, the wife respondent has not proved to its satisfaction that he should be refused a divorce, that if he re-marries he must understand that he has obligations towards her and if he does not behave properly from the point of view of maintenance appropriate steps can be taken. Objections of that type, and many other kinds of objections, have been brought, but never brought successfully. Unless the respondent can prove that the breakdown of the marriage is due to a wrongful act of the petitioner the court would be unlikely to assist.

9335. The practical result of that is that what we could call the guilty spouse could divorce the innocent spouse if that innocent spouse failed to prove that the guilty spouse was the cause of the separation?—Yes, I think that would be so. We have had cases, amazing though it may be, of a woman obtaining an order for separation in the magistrates' court, or a decree for judicial separation in the Supreme Court, on the ground of grounds of matrimonial misconduct and the husband coming to the court and saying that on such and such a date his wife obtained an order for separation and that separation

has persisted for three years. If the wife does not object to defend, the court would not be concerned to refuse him his freedom.

9336. That leads me to the next question I was going to ask you, whether the result of this line of defence is this: that, to use the terms guilty and innocent, if an innocent spouse is left by a guilty spouse what she ought to do is to go at once and try to get a magistrates' order in order to preserve the evidence, so that if at the end of three years he comes forward wanting a divorce, she can then produce her order?—She should take legal advice, Sir.

9337. I am assuming she does that with legal advice.—Because there are women, particularly in these days where there is more equality of earning, who say, where the marriage has been unhappy, "I do not want anything from him, he has gone, so much the better; I will deal with my own maintenance".

9338. I am just trying to test how an innocent person can be protected against the notion of a guilty person if the innocent person does not wish to be divorced?—The innocent party might lose the advantage successfully to defend at the end of three years by inactivity at the early stages.

9339. That is the point, that is bothering me. In practice in New Zealand, in order to avoid that result, where there is a real matrimonial offence committed, does the woman go to the magistrates' court and get an order, so as to be in a position, if her husband takes action at the end of three years, to produce that order and say, "Look, he left me, it was his fault"?—I would not say that in the majority of cases today a woman—it is mostly a woman—in this position would go to the magistrates' court and seek to get an order, but in many cases, of my own knowledge, she would go to a solicitor and have it recorded that she had been willing to maintain the marriage status but that it was misconduct or desertion on her husband's part that had led to the separation. In other words, she would have the matter recorded.

9340. Can you explain that? How would the record be?—She would inform her solicitor of the real position and he would write to the husband setting that out. Very often there might be an inter-change of solicitors' letters. The husband would reply that it was not his fault, it was her fault, and the matter would probably rest there. In many instances, as you say, the wife would go to the magistrates' court, or she might even obtain a decree for restitution of conjugal rights to protect her position, or if the case is one of adultery she might get a decree of judicial separation.

9341. It is a real difficulty, is it not?—It is a difficulty that might cause hardship from time to time but, from a practical viewpoint, I doubt whether it causes very much hardship, because if the grounds are there they are usually capable of some proof.

9342. It all depends on your standard of proof. Personally I come from Scotland where our standards are pretty high.—Yes.

9343. I see, for instance, that you appear to accept simple confessions in adultery cases?—Yes, the court is satisfied as far as it can be.

9344. Without any proof at all?—Without any outside proof.

9345. I make that comment to show the distinction there might be. Your courts may accept as evidence what I would not call evidence.—It is not ordered to divorce; the court will accept uncorroborated claims against estates if it is satisfied of the truth of the claimant's version.

9346. In paragraph 10 of your memorandum you say:—

"Where one party says, 'I've had enough and I'm going', the other retorts, 'Go, and good riddance to bad rubbish', it is not altogether easy to know whether this situation, recollected three years or more later, amounts to an agreement for separation or a mere acquiescence in an act of desertion."

What is the difference?—I was asking to illustrate one difficulty that the court has occasionally, namely, that there is no clear evidence of any agreement to separate. There has been some sort of discussion three years previously, one party has said that he is going away and

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the other has replied, "Go, and good riddance to bad rubbish". The court is placed in the difficulty in such a case of having to decide whether that is merely desertion on the part of one party or whether it amounts, in fact, to an agreement for separation. I went on to say that we have not yet determined whether such a situation might carry with it an implication of some sort of agreement to separate. There have been cases decided both ways. The Full Court decided in the instance I gave that it was not a separation at all, it was an act of desertion on the part of the respondent, the petition would have to be dismissed and the petitioner would have to commence again on grounds of desertion. Other judges have been able to spell into the situation something in the nature of an agreement for separation.

9343. For myself, I would have thought that that was an agreement, if the other party had acquiesced.—We have a Full Court decision against that view and I merely instance this to show that difficulties have arisen, particularly in the case of a so-called oral agreement to separate. (Chairman): I must say that it does not look like an agreement to me, so it shows how difficult it may be to determine. If one says, "I have had enough, I am going" and the other in a pet or a moment of anger says, "Go, good riddance to bad rubbish", that may be merely accepting the situation with a bit of temper that the man is going, or it may be, "Well, I entirely agree with you, off you go, I am quite content". (Mr. Young): I was rather looking ahead. I was assuming that there had been a lapse of three years. I would have spelt out of that that if nothing else had happened, she had implicitly accepted the separation. It was the words plus the three years during which nothing had happened. (Chairman): I quite see.

9348. (Mr. Young): In New Zealand there is some statutory power under which the court can impose upon a landlord a new tenant by transferring the tenancy from the husband to the wife—I was given permission to peruse a draft of a Bill which is to be dealt with at the June sittings of our Parliament in New Zealand. In this draft Bill there is a provision to protect deserted wives—it is called "protection of deserted wives", although the provision is wide enough to cover the rare case of a husband. Where the wife is left by herself or with young children to support and there has been a tenancy in the husband's name the courts are to be empowered to vest that tenancy in the wife, subject as I say in my memorandum, to rights of appeal in favour of the landlord. This is not yet law but I have every reason to think it will become law.<sup>12</sup> This has been a matter of some agitation by women's groups, and quite rightly so, because the landlord has taken the view that the wife never had a tenancy and is a mere trespasser when the husband goes, and her position has been made very embarrassing.

I should add that the court already has that power under the Destitute Persons Amendment Act, 1951, in respect of what we commonly call separation and

maintenance cases, and it is now proposed to extend that power to make it applicable to cases of divorce as well.

9349. (Chairman): I wanted to ask you a further question arising out of Mr. Young's question. You say that except for a change of tenancy the rights of the landlord will not be affected and wide rights of appeal in his favour will be created by the legislation. I think that the normal reaction of the landlord would be this: if the wife is still able to pay the rent and carry out the obligations as her husband did, then he would not mind, but if the wife was not working, if she were a woman with no means at all, he would object very strongly to having her substituted as the tenant. What rights of appeal do you contemplate? On what principle could the court decide an appeal by the landlord, because it is always a hardship on a landlord to have a less substantial tenant?—The change in the law in regard to separation and maintenance cases is of very recent date, so that this somewhat substantial change in our law has not yet been the subject, as far as I know, of any authoritative judicial decision. But I would say this, that from my own knowledge of discussions which have taken place on this matter, it would not be a satisfactory ground of appeal by a landlord that the substitution of a wife who was considered unlikely to pay the rent would place him in a worse position than he occupied when the husband was a tenant. The court would be inclined to say, "You have got your remedy if the wife does not pay the rent, you can obtain possession because she has not complied with the terms of the lease or the statutory tenancy or whatever it may be". That is implicit in the use of the words "except for the change of tenancy". The landlord is not placed in any worse position in so far as his rights are concerned except that he must accept the wife willynilly.

9350. If that is not a ground of appeal for the landlord it is difficult for me to see what ground of appeal he could have. The only way in which he is affected is the change of tenancy. If it is not a ground of appeal to say, "I have an imputed tenant instead of a substantial one", what ground of appeal could there be?—I could possibly visualise grounds of appeal where, subject to the existing tenancy, the landlord may have disposed of the property. We have also had cases where the landlord has been in difficulties in turning into business premises premises that have been occupied by tenants over the years because there has been a protection by statute, and it may well be that in a case such as that, the husband having ceased to be the tenant, the court may be induced to say, "The time has now arisen where, owing to the difference between these parties, a landlord has a right to sell or otherwise dispose of his property". In the draft Bill there are a number of sub-clauses dealing with these rights of appeal and I thought it would be wise to set them out in a memorandum of this sort.

(Chairman): We are very grateful to you for your memorandum and for coming to answer our questions today, it has been a great help to us.

(The witness withdrew.)

## PAPER No. 122

## STATISTICS SUPPLIED BY MR. W. E. LEICESTER

SUPREME COURT OF NEW ZEALAND—DIVORCES—AVERAGE DURATION IN YEARS OF MARRIAGES WHERE SEPARATION WAS THE GROUND FOR A DECREE OF DISSOLUTION

	Husband's Petition	Wife's Petition	Average for year
1945	15.8	14.9	15.4
1946	15.1	13.6	14.3
1947	14.6	13.7	14.1
1948	14.8	13.1	14.0
1949	14.4	13.6	14.0
1950	15.0	13.3	14.1
1951	14.8	13.3	14.0
Average over whole period	14.9	13.6	14.3

## PAPER No. 123

## STATISTICS SUPPLIED BY THE DEPARTMENT OF JUSTICE, NEW ZEALAND

SUPREME COURT OF NEW ZEALAND—DIVORCES—AVERAGE DURATION IN YEARS OF MARRIAGES  
DISSOLVED ON THE GROUNDS SHOWN

Period 1936-1942	Husband's Petition								Wife's Petition							
1936																
Adultery	...	...	...	...	...	...	...	...	10.1	...	...	...	...	...	9.6	...
Desertion	...	...	...	...	...	...	...	...	14.4	...	...	...	...	...	14.7	...
Non-compliance with restitution order	...	...	...	...	...	...	...	...	8.9	...	...	...	...	...	8.1	...
Separation	...	...	...	...	...	...	...	...	14.8	...	...	...	...	...	13.5	...
Other grounds	...	...	...	...	...	...	...	...	20.1	...	...	...	...	...	16.7	...
1937																
Adultery	...	...	...	...	...	...	...	...	11.0	...	...	...	...	...	11.4	...
Desertion	...	...	...	...	...	...	...	...	13.9	...	...	...	...	...	14.9	...
Non-compliance with restitution order	...	...	...	...	...	...	...	...	9.2	...	...	...	...	...	8.8	...
Separation	...	...	...	...	...	...	...	...	14.5	...	...	...	...	...	13.8	...
Other grounds	...	...	...	...	...	...	...	...	13.0	...	...	...	...	...	10.4	...
1938																
Adultery	...	...	...	...	...	...	...	...	10.2	...	...	...	...	...	11.1	...
Desertion	...	...	...	...	...	...	...	...	14.3	...	...	...	...	...	15.5	...
Non-compliance with restitution order	...	...	...	...	...	...	...	...	9.4	...	...	...	...	...	8.9	...
Separation	...	...	...	...	...	...	...	...	15.0	...	...	...	...	...	14.0	...
Other grounds	...	...	...	...	...	...	...	...	22.6	...	...	...	...	...	13.5	...
1939																
Adultery	...	...	...	...	...	...	...	...	9.6	...	...	...	...	...	11.3	...
Desertion	...	...	...	...	...	...	...	...	16.7	...	...	...	...	...	17.0	...
Non-compliance with restitution order	...	...	...	...	...	...	...	...	8.4	...	...	...	...	...	8.1	...
Separation	...	...	...	...	...	...	...	...	16.4	...	...	...	...	...	14.5	...
Other grounds	...	...	...	...	...	...	...	...	17.1	...	...	...	...	...	18.0	...
1940																
Adultery	...	...	...	...	...	...	...	...	9.4	...	...	...	...	...	11.3	...
Desertion	...	...	...	...	...	...	...	...	15.2	...	...	...	...	...	16.0	...
Non-compliance with restitution order	...	...	...	...	...	...	...	...	9.2	...	...	...	...	...	9.5	...
Separation	...	...	...	...	...	...	...	...	15.7	...	...	...	...	...	13.9	...
Other grounds	...	...	...	...	...	...	...	...	21.9	...	...	...	...	...	18.4	...
1941																
Adultery	...	...	...	...	...	...	...	...	9.9	...	...	...	...	...	10.9	...
Desertion	...	...	...	...	...	...	...	...	15.7	...	...	...	...	...	18.2	...
Non-compliance with restitution order	...	...	...	...	...	...	...	...	9.0	...	...	...	...	...	11.9	...
Separation	...	...	...	...	...	...	...	...	16.5	...	...	...	...	...	14.4	...
Other grounds	...	...	...	...	...	...	...	...	17.4	...	...	...	...	...	13.1	...
1942																
Adultery	...	...	...	...	...	...	...	...	10.1	...	...	...	...	...	11.0	...
Desertion	...	...	...	...	...	...	...	...	16.3	...	...	...	...	...	16.8	...
Non-compliance with restitution order	...	...	...	...	...	...	...	...	9.0	...	...	...	...	...	11.1	...
Separation	...	...	...	...	...	...	...	...	16.8	...	...	...	...	...	14.1	...
Other grounds	...	...	...	...	...	...	...	...	20.2	...	...	...	...	...	6.7	...
1943 and 1944																
Owing to the war computation of the figures and publication was not undertaken.																
Period 1945-1951 (excluding Separation—See Paper No. 122)																
1945																
Adultery	...	...	...	...	...	...	...	...	8.0	...	...	...	...	...	10.3	...
Desertion	...	...	...	...	...	...	...	...	14.9	...	...	...	...	...	15.9	...
Non-compliance with restitution order	...	...	...	...	...	...	...	...	8.0	...	...	...	...	...	8.7	...
Other grounds	...	...	...	...	...	...	...	...	20.5	...	...	...	...	...	17.1	...
1946																
Adultery	...	...	...	...	...	...	...	...	8.0	...	...	...	...	...	10.5	...
Desertion	...	...	...	...	...	...	...	...	16.2	...	...	...	...	...	16.0	...
Non-compliance with restitution order	...	...	...	...	...	...	...	...	7.9	...	...	...	...	...	10.4	...
Other grounds	...	...	...	...	...	...	...	...	20.1	...	...	...	...	...	7.6	...
1947																
Adultery	...	...	...	...	...	...	...	...	9.2	...	...	...	...	...	11.0	...
Desertion	...	...	...	...	...	...	...	...	13.8	...	...	...	...	...	13.9	...
Non-compliance with restitution order	...	...	...	...	...	...	...	...	8.4	...	...	...	...	...	9.9	...
Other grounds	...	...	...	...	...	...	...	...	16.6	...	...	...	...	...	7.9	...
1948																
Adultery	...	...	...	...	...	...	...	...	9.3	...	...	...	...	...	11.3	...
Desertion	...	...	...	...	...	...	...	...	14.3	...	...	...	...	...	13.7	...
Non-compliance with restitution order	...	...	...	...	...	...	...	...	8.8	...	...	...	...	...	10.6	...
Other grounds	...	...	...	...	...	...	...	...	12.6	...	...	...	...	...	12.3	...
1949																
Adultery	...	...	...	...	...	...	...	...	9.6	...	...	...	...	...	10.4	...
Desertion	...	...	...	...	...	...	...	...	13.2	...	...	...	...	...	12.4	...
Non-compliance with restitution order	...	...	...	...	...	...	...	...	8.1	...	...	...	...	...	9.3	...
Other grounds	...	...	...	...	...	...	...	...	17.1	...	...	...	...	...	11.5	...

PAPER No. 123—STATISTICS SUPPLIED BY THE DEPARTMENT OF JUSTICE, NEW ZEALAND

		<i>Husband's Petition</i>	<i>Wife's Petition</i>
1950			
Adultery ... ..	9.3	11.8	
Desertion ... ..	13.9	13.7	
Non-compliance with restitution order ... ..	9.0	10.1	
Other grounds ... ..	18.1	10.4	
1951			
Adultery ... ..	9.4	10.6	
Desertion ... ..	14.5	13.1	
Non-compliance with restitution order ... ..	7.9	10.2	
Other grounds ... ..	16.7	10.9	

## FORTIETH DAY

Tuesday, 14th July, 1953

## PRESENT

THE RT. HON. LORD MORTON OF HENRYTON, M.C. (*Chairman*)

THE HONOURABLE LORD KEITH

MISS M. W. DENNEY, C.B.E. (*Secretary*)

(NOTE.—The Commission agreed to delegate to the Chairman and to Lord Keith, a Vice-Chairman, the responsibility for hearing evidence as to the working of the divorce law in New Zealand.)

## EXAMINATION OF WITNESS

(The Hon. Mr. JUSTICE FINLAY, Judge of the Supreme Court, New Zealand; called and examined in private.)

9351. (*Chairman*): First I will ask you a formal question. Will you explain your position in New Zealand, the length of time you have been in the profession, and the various stages of your career?—I have been a Judge of the Supreme Court since 1943. Before that I was in practice as a barrister and solicitor at Auckland for twenty years, doing mostly advocacy. Between 1909 and 1923 I was practising in the country, again mostly doing advocacy, but throughout all the time I was practising I was fairly actively engaged in solicitor's work, in the sense that I carried the responsibility for it, and perhaps because of my ancestral aversion I took considerable care and enough time to see that the solicitor's work was done effectively and properly.

9352. So that you have a good all-round knowledge of what we here would call the two branches of the profession?—I think so, yes.

9353. Did you, in the course of your career before you went on the Bench, have much divorce work?—Yes. I never had a practice in divorce that was out of proportion to the rest of my practice, but in the course of my practice I was frequently employed as a consultant by men who specialised in divorce. We have men in New Zealand who do a great deal of divorce work—a very great deal. At every season—and we have four in the year—some of them might have, say, a hundred cases each. But those men are not good lawyers as a rule, and when they meet with trouble they go to other men for help. That is one way in which I got a lot of experience, but apart from that I suppose I did as much divorce work as anyone else in the city.

9354. You have read, I know, both the memorandum as to divorce in New Zealand which Mr. Leicester supplied to us [see Paper No. 121] and also the oral evidence which he gave on 22nd April this year [see Questions 9283-9350]. Would you go through that evidence and tell us of any points on which you differ from Mr. Leicester's views, either written or oral? I realise I am putting a burden on you, but I think it may save time in the end if you start with that, and it might eliminate a good many of the questions which we might otherwise have to put to you.—I find that difficult. When I read Mr. Leicester's evidence it seemed to me that there was a fundamental difference between us in our views on the whole topic. I think that you have to start with the realisation that our divorce jurisdiction was a direct inheritance of your own. Our first Divorce Act, which was introduced in 1867, was almost a verbatim copy of the English Act of ten years before. That established the basis, and except in one or two respects we have

not adventured far from the spirit of that Act. It is not, as Mr. Justice Jackson said in his Cordozo lecture in America, a law of people of the same purpose and tradition: on the contrary, it is the law of the same people of the same tradition.

9355. Of course you have gone a long way ahead of English law in at least one respect, which we will come to later. I refer to divorce after a period of separation, subject to certain safeguards.—And I think that in some respects you have gone ahead of us. But it seems to me that you must start on the basis that we are the same people. We started on the same footing, and if I may say so—I do not want to appear to be advocating a course or being sentimental about it—we have dealt with the question of divorce throughout our history in exactly the same spirit. We have exactly the same deep respect for the sanctity of the home and the sanctity of the marriage tie that you have. Here and there we have taken a step forward, always feeling, I imagine—I can only speak as I read the mind of the legislators—that we were taking a step that was for the public good and consonant with the public conscience—I imagine that the same purpose has actuated the English legislators. Our divorce law is administered by us with the same gravity and the same sense of responsibility that I imagine inspires the English judges. These features do not seem to appear in Mr. Leicester's evidence at any point, and they seem to me to make a very great difference. For instance—and this struck me particularly—the notes give the impression that a divorce can be obtained in New Zealand on the written admission of the respondent. The truth is that, just as in England, a written admission is accepted, but equally as in England it is not acted upon unless there is other evidence which takes the truth of the admission beyond the realm of reasonable doubt. That is one respect in which we have completely followed English authority. (We do follow the English authorities with the greatest of respect, and we seldom if ever depart from them.) I think that that qualification goes to the very heart of the matter, and completely alters the evidence of Mr. Leicester as recorded.

I find it difficult just to pick out the statements in Mr. Leicester's evidence phrase by phrase and say, "I do not agree with that," or "I do agree with this". There is, as I see it, a radical, a fundamental, difference between the point of view expressed by Mr. Leicester and the point of view which I think is the correct one to offer as the view of the judiciary in New Zealand. May I say this, that I am, of course, speaking entirely on my

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[Continued]

own responsibility? I have no warrant or authority from any of my brethren to express their views. I got the request to give evidence just in the last few minutes before I ended, and I had no opportunity to consult with anyone, so that I have no warrant to speak for anyone but myself.

9356. Of course it was the same with Mr. Leicester. Mr. Leicester was expressing his own views as a member of the Bar. Would it make it easier for you if first I, and then Lord Keith, put questions to you on specific parts of Mr. Leicester's evidence?—I would prefer that.

9357. I will start on that footing. I realise your difficulty.—I would do what you asked willingly. The only thing is that I find it difficult. There is this other difficulty, too, that I do not want to appear as a critic of Mr. Leicester. I feel that it is hardly proper for a judge to express disapproval or approval of counsel in respect of counsel's own personal views.

9358. In that case I will put questions to you, and if Lord Keith wishes he can deal with anything arising out of my questions and afterwards he will put any questions he wants. Would you turn to paragraph 2 of Mr. Leicester's memorandum? He says:—

"Of all the parts of the British Empire, New Zealand has, I think, the most liberal divorce laws, and this may be due to the fact that we are a primary producing country and expensive legislation has not been the least of our primary products. In much of this legislation we have striven to remedy grievances rather than to achieve theoretical perfection."

If I may pause there for a moment, some of us in the Commission have a feeling that if one sets out to remedy grievances one may possibly be in danger of making bad cases lead to bad law, and I wondered whether you agreed with Mr. Leicester's view that, in the legislation that he refers to, you have striven to remedy grievances rather than to achieve theoretical perfection?—I do not know why he put that in. I do not follow the reasoning. I do not see what relation the fact that we are a primary producing country has to the adoption of expensive legislation. I do not see any connection between the two, nor do I think that our legislature has ever set out, with one possible exception, to remedy grievances.

9359. What is the one exception?—The one exception of which I know—one can only speak, of course, of one's personal experience—the one instance in which the legislature gave way to popular clamour was in respect of the law giving a right to divorce after three years' separation. When first introduced, it was an absolute right, and there was an outcry that wrongdoers could get the advantage of their own wrong, and in the very next session—in 1921, I think—an amendment was passed, which is still in the Act, that, if the person not to blame for the separation objected, then the divorce could not be granted.

9360. Do you yourself regard it as an improvement in the Act that this defence is open to what I may call for convenience the innocent party?—That I regard as a great sociological question. It is primarily a question for the parliamentarians. There are two ways of looking at the matter. If you give the guilty party the right to get a divorce however blameworthy his conduct may have been in provoking the separation, then you are inflicting a disruption of status on an innocent party, with consequential detriment in many respects. On the other hand, if you do not give that person his freedom, it may not be in the public interest to keep him in a state of suspension and unable to contract another marriage. You have the two conflicting points of view. There is also another aspect that I am conscious of, namely, that the existence of the proviso does put an innocent party in a good negotiating position when it comes to maintenance and that kind of thing. I know from my own experience that it is often used for that. On the other hand, it is quite true that, as long as the proviso is there, a wife who has been subjected to ill-treatment and the like will often, out of sheer jealousy or vengeance, refuse to give a man his freedom.

9361. Both sides have been put very much in the way that you have put them, but those who think that the proviso is an improvement have put it this way, that

here is a woman who has accepted the bonds as well as the benefits of marriage: she has got the married status and has not committed any matrimonial wrong. Is it right that, against her will, she should be divorced? Although in your Act there are, I think, provisions as to maintenance, she does lose certain other rights such as pension rights and rights of intestacy, does she not?—Yes, I did say that there were detrimental consequences to loss of status.

9362. A lot of women who have written to us have said that it would be very hard on a wife who had done nothing wrong, whose husband perhaps had gone off with another woman, to see that other woman put in the position of his wife with the consequential results that I have mentioned, but of course I quite appreciate the other side to it. There was, I understand, a considerable outcry in New Zealand until the proviso was put in?—Yes, there was a considerable outcry and the proviso was put in. So far as I know, it is the only instance in which our legislature ever acted—and I am not saying whether it acted rightly or wrongly—in accordance with popular clamour.

9363. Mr. Leicester then goes on:—

"In the past twenty years, various Ministries have tended to regard New Zealand as the world's social laboratory, and the search for policies of broad humanitarianism, backed up by fifty years of women's franchise and women's organisations of an astonishing number and variety, and to be found in every part of the Dominion, has resulted in the gradual widening of the grounds for divorce."

I would like to put this question to you, which I also put to Mr. Leicester. I put it at the request of one member of the Commission. The suggestion there seems to be that women's organisations have been rather in the forefront of demanding changes in the direction of easier divorce. Is that your experience or is it not?—No, I have no reason to think that that is so. I still think that what has been done in the way of changing our divorce law has been done in consonance with public conscience and done in a deliberate and judicial way to meet a human situation that was difficult. I have never known women as a body—they are well-organised in New Zealand in some respects—to take up any particular stand on divorce. In fact, amongst one's friends one finds every kind and shade of opinion about what should and what should not be grounds of divorce, and I think those differences of opinion permeate all women's organisations. I do not think that any of these organisations—and they are all quite vocal as one would expect—have ever taken up the subject of divorce with any great seriousness. They may have done so spasmodically.

9364. Would you turn to paragraph 10? Mr. Leicester says:—

"Separation that has lasted not less than three years has resulted in nearly one thousand petitions in divorce annually being presented upon this ground, and it is the only one of the various grounds for divorce where the petitions of wives outnumber those of husbands."

Would you agree that the creation of a new ground for divorce tends to increase the number of divorce cases?—Yes.

9365. Do you think that it has the effect of making people who has sometimes been described as "more divorce-minded" if the way to divorce is made easier?—Personally I doubt that very much. I do not think that any couple in reality and in fact ever embarks on matrimony with an idea at the back of their mind that if they do not get on they can separate and in three years get a divorce. I do not think that that is a material factor at all.

9366. I do not think that it has been put as a conscious intention.—Intention is an elusive thing and it is very difficult to generalise about it in any way, but I should be surprised if any couple ever embarked on matrimony with that idea—there might of course be the odd exception.

9367. I think it was put, not so much that it was a conscious idea as that marriage was unconsciously or sub-consciously regarded as not such a stable union; with this result, that entry into marriage was embarked upon with less thought. Secondly, and perhaps more

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[Continued]

strongly, that if it is easy for people to get a divorce they are not so inclined to worry through the difficult periods and be determined to make a success of marriage. There has been a good deal of evidence before us to that effect. What would you say as to that?—As to the separation ground, I am very doubtful that that is a factor at all. I do not think that the existence of that ground has weakened the bond of matrimony one bit. But I am prepared to agree that the ground which I dislike intensely, and that is divorce for failure to comply with a decree for restitution of conjugal rights, has that effect.

9368. Yes; I was coming to that—I think there is an effect there. Marriage is a difficult thing to discuss in general. Although there is always a considerable proportion of improvident marriages, I am very doubtful if any improvident marriage has ever been entered into with the idea of divorce at the back of the mind of either party. I think the majority of people go into marriage with a sense of responsibility and in the hope that the marriage is going to be a success. One cannot just say out of hand that separation being a ground for divorce, it will weaken the general conception of responsibility as to marriage, because divorce itself carries so much responsibility.

9369. I am not sure that I follow that quite!—To be divorced leaves the man subject to obligations as to maintenance; he has burdensome obligations as to children. The wife is left with family obligations that are serious and far-reaching. I do not think that they would allow those responsibilities—which they must have in mind—to be diminished by any such thought as: "We are going into this, but we can get out of it".

9370. There is a reference to the Victorian traditions in Mr. Leicester's memorandum. He says: "... a country that, in its moral outlook, still tends to adhere for better or worse to the Victorian traditions". What I have in mind is this. In the Victorian times divorce was looked upon as a great evil, and people consequently, it is said, often came through difficult periods in their lives and ultimately perhaps even became Doris and Joan in their later years when their children grew up; whereas if divorce had been regarded lightly they might possibly have broken up the marriage at an early stage. Does that seem to you to be of any weight at all?—I think that since the war there has been a tendency for the younger people to put up with less than their fathers and mothers did; but I do not think that is by reason of anything to do with divorce. I think that that is by reason of the habits of mind and the outlook that were generated by the conditions under which they have lived. We are, as a people, more Victorian, I think, than you are in England. We are much more inclined to reflect the conservative outlook than the progressive. That is my sincere belief after a lifetime in the country.

9371. May I come now to the question of a decree for restitution of conjugal rights? Am I right in saying that a petition for divorce can be founded on the obtaining of a decree of this kind?—Yes, and that can be done right away.

9372. Do you regard that as a good thing or a bad thing?—I regard it as a calamity. The history of the legislation has shown it to be a calamity. It was brought in as a ground of divorce in 1898; in 1907 it was repealed. I remember so well an incident. We then had a judge of great capacity, Mr. Justice Edwards, and when he was embarking on one of these restitution suits, he said to the counsel: "All right, now go on with the facts". That was a shattering thing from a man of his eminence; and very largely on account of that, and because the proposal had the support of a substantial body of opinion, non-compliance with a restitution decree as a ground for divorce was repealed in 1907. It was re-introduced in 1920. I do not know why it was ever brought back. All I can say is that I do not know anyone of responsibility who thinks that it is a good thing. According to my information, it has been for some time in the mind of the Government—the two recent Governments—do repeat it. The last suggestion I heard was that it should be made a ground of divorce only after three years, to bring it into conformity with the separation ground.\* Frankly, I regard the ground as it is now as a disaster.

\* This has now been effected by Section 5 of the Divorce and Matrimonial Causes Amendment Act, 1953.

It was suggested by Mr. Leicester that the judge had the responsibility of determining whether or not there was a genuine desire for the return of the spouse. After hearing hundreds, perhaps even thousands, of these cases, I am only too conscious of the absolute impossibility of forming any conclusion at all about it. One gets, say, a young woman who goes into the witness box and says: "My husband walked out and left me; I want him back; I am sincere". One knows nothing of the circumstances; one knows nothing of their situation or their characters. I do not see how a judge can say, with any confidence at all, that the man or woman, as the case may be, really wants a decree for restitution of conjugal rights, in the true sense, rather than a decree which will enable a divorce to be obtained right away.

9373. I do follow the difficulty.—Frankly, I face every restitution suit with anxiety and trepidation. I do know of one case in which I was convinced to the point of complete certainty. I knew the man; he was a personal friend. He was an oldish man who had married a young wife, and he really wanted his wife back. One of my *colleagues* refused the decree; he came to the conclusion that this old man did not want his wife back; but he was quite wrong; and he was a judge of great experience.

I am convinced that it was a retrograde step to bring back this ground of divorce and that it does tend to weaken the conception of the endurance of the marriage bond. Just before I left I had a case in which two young people were involved—I think they were both under twenty-one. They had been married about a month or six weeks; the husband disliked living with his wife's family; then he said he would not live there any more, and walked out. He could not find anywhere else to take his wife, unfortunately, as conditions are in New Zealand, and she brought a suit for restitution of conjugal rights, within a matter of a month or two of the marriage. It was quite obvious to me that it was being brought in order to get a divorce and I just would not make the order. I was told that the case was going to the Court of Appeal—I do not know what was the result.

9374. Of course, that is an extreme case of a decree for restitution of conjugal rights as a basis for divorce; but does not it perhaps go to show that, if divorce is made progressively easier, people are less inclined to struggle during their married life to keep together and to keep it going? That is the extreme case, but does it not show that tendency?—The tendency, of course, no one could deny.

9375. But you would not say it is due to that cause?—No. I think there is that very definite tendency where you have young people who know that they can get a restitution order and then a divorce within a matter of months; but I do not think that that tendency persists where they know that they are going to have a probationary period of three years, during which the husband is going to be subject to financial liability and other obligations; and the wife, perhaps, too.

9376. There is one other question I want to ask you. In paragraph 10, Mr. Leicester makes this comment:—

"In their procedural aspect, divorces based upon separation are not unwelcome by the judges who, in the two largest centres, Auckland and Wellington, frequently deal with thirty or more undefended suits in a day set aside for the hearing of these cases."

I did ask Mr. Leicester what he meant by that, and he explained; but can you throw any light upon the judges' attitude? Is there any special attitude towards divorce on the ground of separation?—No. I, myself, and every judge I know, regards divorce as a very serious proceeding, and we all of us approach one of those wholesale divorce days with a good deal of anxiety.

(Chairman): That is all I want to ask you, unless there is anything arising out of Lord Keith's questions.

9377. (Lord Keith): I have just a little to say in supplement. Could you tell me this—I am very unfamiliar with the history of New Zealand—was New Zealand to begin with a colony under the Colonial Office of this country?—Yes; originally we were part of the territory of New South Wales; but, by the grace of God and the good offices of our friends in London, we were never made a dumping ground for criminals. In 1842 we were given our independence as a colony. I think the Constitution Act of that year set up our first Parliaments. They were

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[Continued]

provisional to begin with, but they were given an autonomy subject to certain limitations that appeared in the New Zealand Constitution Act of England. The measure of self-government was considerable.

9375. So that your legislature then had full power to pass divorce legislation?—Yes.

9376. And it did, I think, pass a Divorce Act in 1867?—Yes; we adopted the English Act of 1857. There has not been any spirit of adventurism about this divorce legislation. The only direction in which we have gone beyond your country is, I think, with our divorce for separation, and with our divorce following restitution of conjugal rights.

9380. Can you throw any light upon the reason for the introduction of divorce after three years' separation?—Yes. It had its basis in the exercise of what was good, sound judgment. This proceeded upon the footing that marriage should be permanent; but it then went a step further and brought into the scale the fact that marriages which were marriages in name only were cruel to the individual and against the public interest. After, I imagine, a great deal of thought and a good deal of careful consideration, the conclusion was reached that if a marriage had failed, and the failure had endured for three years, that was a firm assurance that it was never likely to be any use as a marriage.

I am not speaking as a lawyer now, much less as a judge, but I remember the discussions there were, and this ground had the approbation of the public conscience at the time. I think it still would command public approbation. When I say "public" I do not mean any one and cry; I mean that it would command the support of men of mature years and sound judgment.

9381. That really was very much in line with other information supplied to us. It was said, for instance, that the legal profession in New Zealand as a whole regarded this ground as both desirable in principle and satisfactory in practice. Would you agree with that?—Yes; I would agree with that.

9382. It was also said that the ground had the approval of the large majority of the people of New Zealand? Would you agree with that also?—I believe that to be true. I may be prejudiced in that view; but, after a long lifetime's experience, I am convinced that there should be divorce, and that if a marriage has failed for more than three years and the parties have been apart for so long as three years, they are never likely to come together again.

9383. There is just one other question I would like to ask on that subject. Do you think that, in divorce on that ground, the question of the children's interests is more amicably and reasonably settled between the parties than in the case of divorces on other grounds? Perhaps I might put it this way. Do you find that the parties are more ready to come to amicable arrangements with regard to the children than they are in cases of divorces sought on other grounds?—I do think this takes place; that when the parties want a separation, when the conditions are, they feel, unbearable, they come to some arrangement about the custody of the children. In other words, I think that one or other party subordinates what would normally be his or her view as to the custody to the selfish desire to get away from a failing tie. When the case comes to the court three years later, that arrangement—well-considered or ill-considered as it may be—is an existing arrangement. It is a *status quo*, and the parties tend in consequence to accept the continuance of the *status quo*. To that extent it does make a settlement of the custody question easy because the parties are agreed, but I doubt very much if one would get that agreement if it were not for the fact that concessions were made in order to get the separation; they would much rather get that than jeopardise it by a contest as to custody.

I, myself, and others of my colleagues, are very concerned at the effect of divorce on the children. I am therefore very concerned over these questions of custody. I frankly approach them with a great deal of trepidation, for this reason. I am Chairman of the Prisons Board. (I do not think that you have a similar body in England.) It is a very powerfully constituted body on which there is a psychiatrist of great experience and ability, a retired surgeon of great capacity, the former Under-

Secretary for Justice, and a University professor, a man of great parts. One of our jobs is to see every prisoner each year and recommend his release if we think he ought to be released. The thing that is borne in upon one is the extent to which the boys before the court are not only the products of broken homes, but quite frankly tell one that it was the break-up of the home that was the commencement of their deviation from normal conduct. There is a great anxiety amongst us all as to what can be done about this. New Zealand is in a better position to deal with youth problems than a big country like England or Scotland, and we have been struggling with this problem manfully for years. There is a Child Welfare Department which is dedicated exclusively to the welfare of children; it is well staffed and the staff is well trained. We have got in addition a probation system, which is, I should think, of outstanding merit. Despite all these things we find that the break-up of the home, the removal of the smothering influence of the mother on the one hand, and the disciplinary hand of the father on the other, has a tendency to turn boys loose and set them on evil courses.

9384. When you speak of the broken homes, you are referring to homes broken both by divorce and by separation?—Yes, both.

9385. In the matter of deciding on questions of custody, have you any special machinery to help you in New Zealand, or does the court do it simply on the evidence laid before it?—No. One would never, I should think, make an order for custody without calling for an independent report from the Child Welfare Department. They have a specially trained staff for the purpose, men and women, who go to the homes and see the people and make reports to us. They are *ex parte* reports in the first place, and we pay great attention to them, both because of the independence of the source and the quality of the intellect and the training which has produced them. We make those reports available to both parties, and the discussion then proceeds very much along the lines that the reports suggest. You will appreciate that if a report were that one party is quite a responsible party, but has no amenities for the child in the home, there is a fight about that.

9386. After the order for custody is made, does the Child Welfare Department retain a supervisory and make reports to the court, if necessary?—No.

9387. There is nothing of that sort?—No. There is no provision for that; there may never be. On its face it sounds desirable. On occasions I have wanted assistance of that kind but I have never been able to get it. Where I have made an order about which I felt doubtful, I have been anxious to know what the result was, and I have endeavored to get some kind of report like that, because we can alter a custody order at any time—we have complete authority to do that.

9388. (Chairman): Without any application by the parties?—No, but you will realize that the other party is always just too ready to step in, because there is always a great deal of bitterness about custody questions. However, I found that the Welfare Department could not exercise any continuing supervision and it may be that they can never get authority to do it, because it is suggested that that would be inquisitorial and that people would resent it. The safeguard there—if safeguard it be—is that if the Welfare Department think that the children are being neglected or that they are becoming delinquent or anything of that kind, then they have a statutory right of intervention on their own initiative.

9389. (Lord Keith): Is this Welfare Department a local authority organisation?—No; we differ from you in our internal constitution a good deal. The local bodies deal only with what one might call municipal problems. The Child Welfare Department is a department of the general government.

9390. With branches all over the country?—The branches are widespread. There is no part of the country to which the activities of the Child Welfare Department do not extend.

9391. (Chairman): I wish to put some questions arising out of what Lord Keith has said. First of all, you say that, as I understood it, in every case the judge makes a custody order would get a report from the Child Welfare

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[Continued]

Officer. I wondered whether that applied to undefended cases as well as defended?—No, that would not be possible.

9392. (Lord Keith): It is only where custody is asked for?—It is always asked for; but in undefended cases it is sometimes a leap in the dark, and that is the source of one's anxiety. We could ask for a report in such cases, but you will appreciate that every month each judge in Auckland deals with from thirty to forty divorce cases, and if we asked for reports on every case of custody in that number we would break down the Department.

9393. (Chairman): Do you say that custody is asked for in every case?—Yes, always. Custody of the children is asked for in the petition and an interim order as to custody is made on the decree nisi. The permanent order as to custody is made on the decree absolute. Personally, I have always regarded the interim custody as nothing more than this, that normally one lets the *status quo* remain until the final decree is made, and one comes up to the custody order seriously at that stage; but I was somewhat dismayed last year by the view being put forward that a custody order made on the decree nisi was an order of the court and that it carried all the sanctity of an order of the court and should only be departed from if there was good cause to the contrary. That was not my conception, and I do not think that it is the conception of a good many of us.

9394. (Lord Keith): How do you decide in which cases you require a report from the Child Welfare Department?—The cases suggest themselves, Sir. If you have a mother who has abandoned her children and run away with a man, you have no alternative but to give the custody to the father. On the other hand, if you have a mother who, though blameless, is unable to take the children because she is away at work and has no means of bringing up the children, then all you can do is give the custody to the father and reserve her right of access. You have always got this knowledge, that at any moment she, or any relative, or the Welfare Department, can come to the court and say: "We want this custody order considered again".

9395. (Chairman): What I would like to ask you at this stage is this. Let me take first of all a case where there is no contest at all, the divorce is not defended; custody is asked for by the petitioner and the respondent does not appear on custody. Do you then, as a matter of course, make the order asked for by the petitioner, or do you, in any case of that kind, call in the Child Welfare Officer?—I can only speak here for myself. I personally always enquire where the children are and who is looking after them, and what the circumstances are. In nearly every case I am faced with a situation that is unsatisfactory, so there is no good calling in anybody.

9396. Do you sometimes, even in a case where there is no opposition from the other parent, call in the Child Welfare Officer to satisfy yourself?—Yes. Take a case where it is proposed to give the custody of a child to the guilty mother. In such a case one would not hesitate to call in the help of the Child Welfare Department.

9397. In that case you would have a husband petitioner who says: "I want a divorce on the ground of the adultery of my wife, but I ask you to give her the custody of the child". Is that the case you have in mind?—Yes.

9398. And you would not do that without enquiries?—No. I would never make a custody order without exhausting every means possible of assuring myself that that order was the best order possible in the interests of the child. That, incidentally, is an obligation which is imposed upon us by statute.

9399. One difference, at least, between your country and ours is that in England one can bring a divorce suit without asking for any order for custody at all; that is to say, the parties may have come to some arrangement—That can be done in New Zealand too.

9400. It can?—Yes, one can do that.

9401. I thought you said that a custody order had always to be asked for?—No; the parties always do, but they could come without asking for an order as to custody.

9402. If they do come without asking for an order as to custody, you do nothing about it?—Yes, I do.

9403. What do you do?—I am concerned about the children; I want to know about them.

9404. It has been suggested that in every case in this country—I am speaking of England at the moment—it should be obligatory upon the petitioner to inform the court as to the children, and their circumstances, and to ask for an order as to custody.—I think that we should ask for such information. I, in practice, do.

9405. You in practice do?—Yes, and I think other judges do, too.

9406. Have you any system of attempted reconciliation at any stage in the proceedings, or before them?—In the Supreme Court, no. In the magistrates' court—and our magistrates' courts have very much wider jurisdiction than yours—there are conciliators whose aid the magistrates can invoke.

9407. Is that a State service of conciliators, or a voluntary service?—That is a State service. All our services of that kind are State services. I do not think that the magistrates find that very good results accrue. I am inclined to think that they get better results in their own efforts at reconciliation than they get from the State officer. But those things are outside my direct knowledge. All I know is what the magistrates tell me.

9408. Is it compulsory to consult the reconciliation officer before obtaining a divorce or a separation, or is it not?—No. We do not link the two. I do not think that any conciliation officer ever has any hand in a divorce case. They are all concerned with the magistrates' court where the separation order is used for. A separation order in the magistrates' court is similar to our divorce *a mensa et thoro* or judicial separation. Under our divorce legislation it can be made the basis of a suit for divorce after three years.

9409. It has been suggested that no divorce should be granted if there are children under sixteen and if the judge, looking at all the circumstances, is satisfied that it would be detrimental to the interests of the children to grant a divorce. Have you ever had occasion to consider any suggestion of that kind?—No, but it does not appeal to me as a wise thing to do. There are again conflicting considerations. There is on the one hand the detriment that accrues to the children in their life in a very unhappy home.

9410. Yes, one has to weigh the advantages against the disadvantages.—And there is another factor to weigh: that, if you deny a divorce in those circumstances, you are in the unhappy position that you cannot control the actions or the attitude of the person to whom you deny the divorce. They may, by their conduct, defeat the very purpose that you are seeking to achieve.

9411. I quite see that, but it is suggested that people go for divorce as a rule—as you yourself have said—because they want it, and they arrange the future of the children. It is suggested that some provision of this kind would bring home to them the fact that there are other persons interested in the continuance or non-continuance of the marriage, and that it might possibly have a good effect upon people from that point of view. What do you say about that?—I would not like to generalise about it. Every case has got its own characteristics.

Chairman: Thank you very much; we are very much obliged to you for coming here to help us.

(The witness withdrew.)

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## SUPPLEMENTARY NOTE SUBMITTED BY MR. JUSTICE FINLAY

1. Subsequently I wrote to New Zealand for the information I had been asked to obtain from there. My enquiries were made from Mr. L. G. H. Sinclair, the Senior Supplementary Magistrate at Auckland.

2. In his reply Mr. Sinclair has given me not only his views but also those of his fellow magistrates at Auckland, of whom there are five or six, and of a very experienced counsel in domestic relations cases, a Mr. H. B. V. Townshend. The latter is and has for many years been Legal Adviser to the Auckland Society for the Protection of Women and Children, to which distressed wives in particular commonly refer their difficulties. All the magistrates referred to and Mr. Townshend concur in the opinions expressed by Mr. Sinclair.

3. As at the present time the jurisdiction to make a maintenance order in favour of a wife still living with her husband is only rarely invoked, but it is invoked upon occasion, and the existence of the jurisdiction has an appreciable effect altogether divorced from the extent to which court proceedings are taken—this by reason of the fact that knowing of the jurisdiction husbands are not prone unduly to limit the moneys allowed to their wives, and if they do unduly limit them they are easily induced to remedy their conduct when approached by representatives of the wife. The view is held, therefore, that the utility of the jurisdiction cannot be judged merely from the number of cases which come before the court.

4. Mr. Sinclair and his brother magistrates expressed themselves as having no reason to think that maintenance orders of this kind when made result in disharmony. I rather think that they would also say that these orders do not result in any exacerbation of any existing disharmony. That certainly appears to be the view of Mr. Townshend. As the point may be of moment I recite exactly what Mr. Sinclair has written me. He says:—

"I have made orders in such cases but do not recollect any case in which the effect on the domestic harmony has come to my notice. I have asked the opinion of Mr. H. B. V. Townshend who, as Solicitor for the Society for the Protection of Women and Children in Auckland, has handled more domestic cases than any other local solicitor, and he tells me that in his experience there has been no increase in disharmony between the spouses by the making of a maintenance order. In these cases there is usually an existing disharmony due to the husband either spending too much on drink or gambling, or himself controlling the household expenditure to the exclusion of the wife and probably neglecting to allow her adequate pin money. I have settled one or two cases of this kind myself in court, and have also settled many where the real issue has been separation on the ground of wilful failure to maintain."

5. At that point Mr. Sinclair diverted to point out that simple failure to provide adequate maintenance if all that is necessary to confer jurisdiction to make a maintenance order, whilst to authorise the court to make a separation order that failure must be wilful and without just cause.

6. Mr. Sinclair sums up his conclusions thus:—

(1) Orders of this kind are not frequently made.

(2) There is insufficient evidence to enable it to be said that orders in such cases result in increased disharmony.

(3) The legislation serves a useful purpose.

7. Upon the whole my advice from Auckland confirms the views I expressed to the Chairman, except that I was of the opinion that orders of this kind were not so infrequently applied for as my Auckland correspondent suggests. Perhaps there has been a change in the social attitude since I was concerned with such cases, or it may be that a wider knowledge of the existence of the jurisdiction influences the attitude in money matters of husbands; or it may be, as Mr. Sinclair suggests, that offenders amend their attitude on demand and without the necessity of proceedings.

8. I think this is all the information I can usefully get for the Commission on this topic.

9. The views expressed by Mr. Sinclair and those with whom he has conferred may be taken as a representative opinion for the whole country.

10. Further thought since I gave evidence convinces me that a power to attach wages in respect of payments due under maintenance orders is useful, and not in the main productive of ill consequences. That might not be so if the power to make the order were not exercised with discretion and understanding. It may be taken to be so exercised in New Zealand because only magistrates exercise the jurisdiction, and when I say magistrates I mean stipendiary magistrates whose life work it is to preside in the magistrates' court. They are of course all of them men of legal qualifications and some experience of legal practice—many of them have had very wide experience of practice.

11. The danger is, of course, that if a man's wages are attached to such an extent that only a bare minimum for his subsistence and enjoyment is left to him, he will leave the employment, and in specific cases may abandon habits of industry altogether.

12. Subject to the exercise of such wisdom as an experienced magistrate should possess, nothing but good, I think, can come from a power to attach wages.

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[Continued]

## FORTY-FIRST DAY

Tuesday, 7th December, 1954

### PRESIDENT

THE RT. HON. LORD MORTON OF HENINGTON, M.C. (Chairman)

Mrs. MARGARET ALLEN  
DR. MAY BAIRD, B.Sc., M.B., Ch.B.  
Mrs. R. BRUCE, M.A.  
LADY BRAGO  
SIR WALTER RUSSELL BRAIN, BART., D.M., F.R.C.P.  
SIR FREDERICK BULLOWS, G.C.S.I., G.C.I.E.  
MR. H. L. O. FLECKER, C.B.E., M.A.  
Miss K. W. JONES-ROBERTS, O.B.E.  
THE RT. HON. LORD KEITH OF AVONHOLM

MR. F. G. LAWRENCE, Q.C.  
MR. D. MACE  
MR. H. H. MADDOCKS, M.C.  
THE HONOURABLE MR. JUSTICE PEARCE  
THE HONOURABLE LORD WALKER  
MR. THOMAS YOUNG, C.B.E.

MISS M. W. DINGLEY, C.B.E. (Secretary)  
MR. D. R. L. HOLLOWAY (Assistant Secretary)

### EXAMINATION OF WITNESSES

(Mr. P. ALLEN, C.B., representing the Home Office and the Prison Commission, Mr. N. J. P. HUTCHISON, representing the Scottish Home Department, the Rev. MARTIN W. PINKER and Miss H. L. LONG, representing the Central After-Care Association and Mr. W. HEWITSON BROWN, O.B.E., representing the After-Care Council (Scotland); called and examined in private.)

9412. (Chairman): You have kindly come here today to assist us by giving your views on certain subjects. I will just recite your names and descriptions. If I make any error, will you please correct it? Mr. Philip Allen is an Assistant Under-Secretary of State at the Home Office, and he is representing the Home Office and the Prison Commission; Mr. N. J. P. Hutchison is an Assistant Secretary in the Scottish Home Department; the Rev. Martin W. Pinker and Miss H. L. Long are from the Central After-Care Association; and Mr. W. Hewitson Brown, O.B.E., is Secretary of the After-Care Council.

We have certain proposals before us dealing with preventive detention and murder as possible grounds of divorce. One such proposal is that a sentence of preventive detention for a term of at least seven years, but not a long term of imprisonment, should be a ground of divorce. Against that, it has been suggested that there is really no distinction between a long term of imprisonment and a sentence of preventive detention, and that neither of them should be a ground of divorce. Then, there is a proposal that, if a spouse has been found guilty of murder, and the sentence of death has not been carried out or has not been imposed, the other spouse should be allowed to obtain a divorce if he or she so wishes. That would include a person who, having been charged with murder, has been found to have committed the act but to have been insane at the time and a person in respect of whom the death sentence has been respite because he has subsequently been certified as insane, but it would not include the person who has been found to be insane before trial.

Now would you like in turn to make a statement of your views on these matters or would you rather proceed by way of question and answer throughout?—(Mr. Allen): I think it might be helpful if we made a few preliminary observations on which we could then answer questions.

9413. Are you all making separate statements?—I think we ought to make separate statements. I am speaking as it were officially for the Home Office, but nothing I say can be binding on Mr. Pinker, for instance, who will speak from his own experience in after-care work. We shall try to keep our observations as short as possible.

9414. I can assure you that we are very willing indeed to hear all of you if you wish to speak separately. Mr. Allen, will you make your observations first on these matters and on any other matter which occurs to you?—

Thank you very much. As regards preventive detention, I must say straight away that we in the Home Office were a little puzzled at the suggestion that a distinction could be drawn between preventive detention and long sentences of imprisonment. I am going over familiar ground perhaps, but to qualify for preventive detention a person must be over thirty years of age, must have had at least three previous convictions—two of them involving detention—and must be convicted of a fairly serious, although not necessarily a very serious, offence—an offence punishable on indictment with imprisonment for at least two years. Although the statute itself says quite at large that the detention shall be for not less than five nor more than fourteen years, following some observations of the Court of Criminal Appeal most sentences of preventive detention are in fact for at least seven years. We do still get a few of five years and occasionally of six years. Most of the prisoners serve for five-sixths of the term, unlike ordinary prisoners, who serve for two-thirds. The numbers in England and Wales are quite considerable. Last week there were 1,128 men and 32 women serving sentences of preventive detention in England and Wales. In 1953 there were 150 sentences of preventive detention and of these only a handful were sentences of five years, most of them being seven years or more. In 1953 there were also 165 sentences of more than five years' imprisonment; quite a considerable number of those 165 had previous records quite as bad as those of the persons sentenced to preventive detention. The recidivists who get long sentences of imprisonment go to Dartmoor and most of the preventive detention prisoners go to Parkhurst, and I think it would be a bold individual who would say that the population of Dartmoor was really any better than the population of Parkhurst. Our experience suggests that if a prisoner is up before a court on a really serious charge, for example, manslaughter (which can carry a life sentence), if he has had a lot of previous convictions the court may well pass a long sentence of imprisonment rather than a sentence of preventive detention. If he has committed an offence which is comparatively trivial and carries a maximum of two years' imprisonment, then the chances are that he will go to preventive detention, but if he has committed a really serious offence our experience suggests that he is just as likely to end up with a long sentence of imprisonment. We think that it would be unsafe to assume that the person who has made crime his career would necessarily end up with a sentence of

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preventive detention rather than with a long sentence of imprisonment. That is really the only point I wanted to make on preventive detention. My other comments relate to murder. Would you like me to stop there?

9415. Yes, I would like to ask you this first. I understand from what you have said that the view of the Home Office is that there is no good reason for making one of these grounds of divorce and not the other. Does the Home Office or the Prison Commission wish to say anything on the question of whether or not both should be grounds for divorce?—I do not think we would like to express an opinion on that. We can see the argument for making a long term of detention in prison a ground for divorce, applicable both to imprisonment and preventive detention, but we do not think we are in any better position than anybody else to express a view on the merits. The after-care experts may want to say something on that point.

9416. I think it would be better if we heard from the other witnesses on this question of preventive detention. We can then pass on to the different questions of murder.—(Mr. Hutchison): On behalf of the Scottish Home Department, I should like to express agreement in principle with what Mr. Allen has said. All I should like to add on the subject of preventive detention is to underline, so far as limited Scottish experience enables us to do so, the difficulty to which he has pointed. The Scottish courts have passed very few sentences of preventive detention. There are only six men, I understand, in prison at the moment—a very small figure compared with that which Mr. Allen has quoted. On the other hand, the Scottish courts have, in appropriate cases, awarded long sentences of imprisonment. It is very difficult to say what might have happened in any particular case had the person been tried by an English court, but I think it is not improbable that sentences of imprisonment have been given in Scotland to men who might well have been sentenced to preventive detention had they appeared before an English court. That fortuitous variation in the incidence of the proposal before the Commission might well be a consideration in thinking about this subject.—(Mr. Pinker): I wish first to say that I am not against divorce. I am, however, entirely against any extension of the grounds for divorce to include imprisonment or preventive detention. I am looking at it from the point of view of the rehabilitation of the criminal. We never give up, however many times a man lets us down. There are so many instances where the determining factor in a man's rehabilitation is that the wife has stood by him and has been ready to start married life all over again. For that reason I would be against making imprisonment and preventive detention grounds of divorce—I see no difference between them.

9417. Would you like to elaborate that at all?—Yes. One man comes to my mind now. He started his criminal career when he was about sixteen years old and he served a number of long sentences. His last conviction was in 1927. Just before that conviction he had met a very respectable woman and married her. She did not know about his past at the time of the marriage. However, the law caught up with him for an offence which he had committed before his marriage, and at the trial all his past came out and she learnt about it for the first time. There would have been good grounds, I think, for that woman, if she had been so minded, to have said that she would have nothing more to do with that man but she did not, and it made all the difference to him. He served his sentence, came out in 1929 and found her waiting for him. Instead of allowing other people to talk her round, she forgave him and prepared for his return. I was in touch with him for twenty-two years. They were happily married and I am absolutely convinced that it was the wife standing by him that kept that man from further crime. I could give many instances along the same lines. Again and again we set a man off and then he fails, but it is our job to keep on trying. It is always easy to condemn and very difficult to forgive; but it is in forgiveness that we find our most positive factor in as much as forgiveness begets the passion to restore; that is my faith. That is why I would be against any extension of the grounds of divorce that made it possible for someone to break the marriage bond just because his or

her spouse had been sent to prison, whether long-term imprisonment or preventive detention.

9418. Thank you. Who wishes to speak next on this subject—Miss Long?—(Miss Long): I entirely agree with what Mr. Pinker has said. We do find that where the other partner sticks to a woman prisoner, there is some hope of her giving up her criminal career. Of course those of us who deal only with women are dealing with a considerably smaller number. I have got out some figures showing the position of the women discharged to the women and girls' division of the Central After-Care Association between 1952 and 1954. There were eleven of those two were single at the time of their conviction, one was a widow, two were divorced prior to their conviction—of whom one had been divorced, re-married and separated from her second husband—and six were separated prior to conviction. Of the last six cases, either the husband had deserted the wife or she had deserted him. There were no husbands to return to in these particular cases. I think that, in practice, people have usually settled their matrimonial position before they come to the stage where they have their last conviction. You see, when a person is sentenced to preventive detention, he or she is getting on in years—our youngest woman is thirty-three and our oldest is sixty-six—and I think that for all practical purposes the reason for an extension of the facilities for divorce in the case of women does not exist.

9419. Have you ever in the course of your work come across a case in which a married woman, sentenced to preventive detention, has been living with her husband immediately prior to her conviction?—No.

9420. Both you and Mr. Pinker, I understand, place preventive detention and long terms of imprisonment on the same footing. Would you say how far what you have just told us applies to long terms of imprisonment for women?—I take exactly the same view as Mr. Pinker. There is, in effect, no difference between preventive detention and long-term imprisonment.

9421. Have you had to deal with cases in which women sentenced to long terms of imprisonment were living with their husbands at the time they were sentenced?—Yes, in murder cases.

9422. (Mr. Fletcher): Are there many apart from murder cases?—Not very many.—(Mr. Allen): If I could just interpolate, it is very rare for a woman to get a long sentence of imprisonment. I am looking at the statistics. In 1952, there were no sentences of more than five years passed on a woman. In 1951 there was one sentence in that category.

9423. (Chairman): Is there anything you wish to add on the subject of preventive detention and imprisonment, Miss Long?—(Miss Long): No.

9424. Mr. Hawkeson Brown, would you like to give us your views?—(Mr. Hewitt Brown): I am not quite in agreement with my colleagues on the subject. We feel that preventive detention and long-term imprisonment with previous convictions should be grounds for divorce. For the reasons which Mr. Hutchison gave, I class them together. What interests me is why the proposal before the Commission suggests seven years as the qualifying sentence when the minimum period for preventive detention is five years. I would have no quarrel if it came down to five years. Our feeling is that a judge has decided that a man who is sentenced to a long term of imprisonment, having had several previous convictions, or who is sentenced to preventive detention, has not tried to take his place in the community properly, therefore, why should his wife be tied to him if she herself wants to live a normal life. The danger is that she will be driven into immorality while he is locked up. I am at one with my colleagues regarding rehabilitation, but rehabilitation does not necessarily need to stop merely because of divorce proceedings. The man who has been sentenced either to a long term of imprisonment after he has had several previous convictions, or to preventive detention, must have been the subject of several previous unsuccessful attempts at rehabilitation. I do not think that there would be a spate of divorces, because we have found that the woman in quite a number of cases will stick to the man and will visit him while he is inside; on the other hand, we have also found that a woman is driven into immorality and

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will go off with another man and live with him. I think that that would cover my views on recidivism and preventive detention. I do not think a long term of imprisonment should of itself be a ground for divorce. One can get two or three years for embezzlement and that need not necessarily mean that there is an unhappy family situation. I have the feeling that the type of offence might be taken into account, but I have no very strong views on that.

9425. (Lord Keith): What standard, Mr. Hewitson Brown, would you apply to establish a person as a recidivist? How many sentences would he need to have served?—There is a definition in Scotland:—

"Recidivists mean persons (other than short-term prisoners) aged twenty-one years or over who are undergoing sentences of imprisonment without the option of a fine or penalty for a serious crime against the person, a crime against property with or without violence, forgery or a crime against the currency, and having at least two previous convictions of any such crimes with sentences of penal servitude or imprisonment (without the option of a fine or penalty) or of Borstal detention."

9426. Where does that definition occur?—It is used in the Scottish Home Department.—(Mr. Hutchison): It has been prepared for statistical purposes in an attempt to analyse the incidence of recidivism.—(Lord Keith): It would be useful, if there were to be divorce for recidivism, to have a statutory definition.

9427. (Chairman): We have heard your views on the subject of imprisonment and preventive detention as grounds for divorce. Each member of the Commission will now have an opportunity to ask questions. If I may start with Mr. Hewitson Brown, what is the distinction between the After-Care Council and the Central After-Care Association?—(Mr. Hewitson Brown): The After-Care Council is established under Section 18 of the Prisons (Scotland) Act, 1952, by which it is made lawful for the Secretary of State to appoint a Council to be known as the After-Care Council, consisting of a number of persons interested in the moral and social welfare of offenders.

9428. Perhaps Mr. Pinker would now tell us how the Central After-Care Association was set up?—(Mr. Pinker): The Central After-Care Association was set up to meet the requirements of the Criminal Justice Act, 1948. It resulted from an amalgamation of the Aylesbury After-Care Association for Women, the Borstal Association and the Central Association for the Assistance of Discharged Convicts. They were brought together to form one central after-care association with three divisions corresponding to the three previous organisations.—(Mr. Allen): The Scottish body is established by statute; the English body is an approved society. The statute merely refers to an approved society, and the Secretary of State has approved this particular society for the purpose.

9429. Mr. Hewitson Brown, what experience have you had in dealing with persons sentenced to preventive detention and recidivists who were married at the time of the final sentence?—(Mr. Hewitson Brown): I have made a note of simple cases. We had one man who was charged with lewd practices with a daughter and was given seven years' penal servitude; I do not think he had any previous convictions. While he was inside his wife went off with another man and had two children by him. When the husband came out she stayed with the other man. He was out seven years and did extraordinarily well. His wife then started trying to obtain alimony from him. Of course he refused because she would not come and live with him. Neither would make a move at all. He could have sued for divorce but he would not. I can think of three or four other cases. There was a man who got four years' penal servitude. He had a previous sentence of ten years' penal servitude in 1927 and he had seven previous convictions. He was interested in his children but not interested in his wife, who had gone off with another man. Then there is quite a young man who is serving a sentence of four years. He had a previous conviction for which he got four years in 1948. He is ex-Borstal and has fifteen previous convictions. His wife went off with another man and he is still inside. What will happen when he comes out I do not know. He was vowing vengeance against the man with whom the wife had gone off. Another case was of a man who had been married only six weeks when he went to prison on a four years' sentence, with six previous

convictions, including three sentences of penal servitude. His wife has left him and gone off with another man. Her present whereabouts are unknown. Another wife had run off with a man and when she found her husband was coming out of prison she disappeared to Canada. These are just several of the cases with which we have been in touch. I want to emphasise, however, that we do not stop trying to rehabilitate those men. I may have given that impression when I said that attempts after attempt had been made to rehabilitate such men. I agree with Mr. Pinker that rehabilitation is a continuous process. So far as the wife is concerned, however, we feel that she might be forced into immorality by reason of the man being a persistent offender and getting a long sentence of detention.

9430. The thing that strikes me at once is this: It seems so strange that you in Scotland apparently attach no importance to the influence of the wife in helping afterwards by standing by the man, whereas we have heard both from Mr. Pinker and Miss Long that they attach the greatest importance to it, as they find it helps a man to reform if his wife stands by him—I would not like to give the impression that the wife does not play a part, but when she has gone off with somebody else, she is not likely to be any help in rehabilitation. If she has ceased to be interested in her husband because of his going in and out of prison, why should she not have the chance to divorce him? I do not suppose many would do so.

9431. It has been said that it is an axiom, both in prison treatment and in after-care, that no prisoner is to be regarded as wholly beyond rehabilitation and that the maintenance of a family life is a major factor in a proper rehabilitation. What would you say to that?—My answer is the same as before, that a judge has decided that this man is unfit to take his place in the community.

9432. Is it not your job to make him fit to take his place in the community?—As I said, I would continue to do that in any case.

9433. Do you not think that the maintenance of family life, assuming that it will continue, is a major factor in rehabilitation?—I think it is a major factor, if it can be maintained.

9434. Would you accept that it is just as important that a man's wife should be encouraged to give him support if he has been sentenced to preventive detention as it is if he has been given a long term of imprisonment?—I accept that. I hope I have made it clear that I am dealing with the case of the wife who is very unhappy in her married life and wishes a divorce from her husband who has been in and out of prison, not with the case of the wife who wants to stay with her husband.

9435. Mr. Pinker, would you care to make any comment on what Mr. Hewitson Brown has said?—(Mr. Pinker): We believe that the loyalty of the wife is the most potent factor in rehabilitation. That is why we pay attention to it the moment a man gets inside; the first thing we do is to find out what is the wife's attitude. If we find that the wife has said that she will have nothing more to do with her husband, we seek to change her view in the interests of the man. It may be that the first time we learn of the position is some time after the man has been in prison. The man comes to see us or one of our representatives, and says, "Will you look into this? My wife is taking this attitude. Will you go into that?" We may arrange a special visit so that the wife can see her husband. We leave no stone unturned to try to bring about a reconciliation because we believe that if a man, however bad he has been, comes out of prison and finds his wife waiting for him to start life afresh, that is the most helpful sign that that man will be rehabilitated. I have a case in mind now of a man—three years' Borstal, one year's imprisonment, four years' penal servitude, three years' preventive detention. He was on fairly good terms with his family right up to going in. Then the relationship became strained. I feel that if it had been possible for that woman to have got a divorce from her husband, on the ground of his imprisonment or preventive detention, she would have been tempted to take the opportunity there and then. We took this case in hand and persuaded the wife to write to her husband. We sent her down to Parkhurst to see him. Because of the attitude of his

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wife, he had rather taken the line, "I don't care. Let her go if she wants to go". It was not until just about the time of the man's release that we succeeded in reconciling them. The wife has been so since and has told us how happy they are together. He is completely changed by virtue of the fact that he had been given that sentence of preventive detention. He had never had such a sharp sentence before. The mere fact that his wife stood by him has made all the difference and he is doing very well.

9435. I appreciate that you start trying as early as you can to find out about the family life but, supposing that seven years' imprisonment or preventive detention was a ground for divorce, do you think that that would have any effect upon your work?—I would say that it would make our work much more difficult because I am sure that in many cases the woman would then take the chance of getting rid of her husband.

9437. And would be less likely to come under your ministrations?—Yes.

9438. It could be said that if a man has been sentenced to seven years' preventive detention it means that he has persisted in a life of crime and that it would be unreasonable to require his wife to put up with the difficulties of a long separation if she feels that at the end of it the position will still be hopeless. Ought she not to be allowed in those circumstances to obtain a divorce and make a fresh start in life if she so wishes?—I do not accept that, Sir. It is unfortunate for the woman but in the interests of the man—and I am concerned with the man and how best to obtain his rehabilitation—I am certain that the most hopeful avenue towards rehabilitation is through maintaining his family relationship.

9439. (Lord Keith): Mr. Pinker, of the 1,128 men serving sentences of preventive detention at the present time, have you any figures to indicate what is the present matrimonial position of the married men? Can you tell us in what percentage of cases the wife has gone off with another man, and in what percentage of cases she is waiting and willing to help to rehabilitate him?—I am afraid that I could not answer that without notice. It would require a lot of investigation. Many of those 1,128 men are in local prisons and we are only just beginning to find out the position in these cases.

9440. I appreciate the difficulty. I just wondered if you could give us any help. Now, Mr. Pinker, I quite appreciate that the woman who is prepared, or can be persuaded, to stick to her husband and be ready to receive him when he comes out, will be a very powerful instrument for rehabilitation. That I quite appreciate. But what about the case of the woman who will not wait for him, who is prepared to go off with another man and who in fact probably will go off with another man? Is she likely to be an instrument of rehabilitation at all?—No, Sir, but I think that we would approach the woman nevertheless.

9441. I quite appreciate that you would try to persuade her to wait till her husband comes out. If you could persuade her, she might be a powerful instrument in rehabilitation, but, on the other hand, if you could not persuade her and she is the sort of person who is likely to go off with another man, what difference does it make that that woman is given the right to get a divorce from her husband in respect of the preventive detention sentence?—I think that that type of woman might be an exception. It does not seem to me to matter whether she could obtain a divorce under these circumstances or not. If, however, it becomes the law that anyone can obtain a divorce just because his spouse is sent to prison, the door to divorce is opened for many who would not otherwise think about it. Let us put ourselves in the position of a man in his prison cell thinking about what is always uppermost in his mind—his family. If the woman suddenly decides, because the law is on her side, that she will obtain a divorce, what can he do? He is absolutely powerless. He cannot see her and talk to her privately in order to persuade her to remain loyal to him. He has just got to accept the position, but all through the years until he is freed, he is becoming more and more embittered and I think that in many cases the situation might be such that the man would be tempted to commit a much more serious crime after release.

9442. I appreciate that and I am quite sympathetic with the man in that position, but I am in some difficulty about the man who, while he is serving a period of preventive detention, learns that his wife has gone off with another man.—I quite agree that it is an extremely difficult situation, but the man can do nothing about it. The most we can do is to try to help him face the situation but I am not saying that we always succeed. We do not.

9443. (Chairman): May I ask a question arising out of what Lord Keith has put to you? Take the case of a woman who is contemplating going off with another man, her husband being in prison. Do you think that she would be more likely to go off if she knew that she could divorce her husband and marry the other man?—I should think, more likely.

9444. (Mr. Flecker): Mr. Hewitson Brown, what is going to be the position of the children? Are they going to be better off if the wife gets a divorce?—(Mr. Hewitson Brown): I think that if she goes off with another man he will look after the children. That is what happened in the few cases I was talking about earlier. I think, therefore, that if she were able to divorce her husband the children would go with the mother to her new husband.

9445. Mr. Pinker, do you not think that the man in the street would say that, if the wife is the sort of woman who is likely to go off with another man when her husband is in prison, surely she is not the sort of woman who is going to be any use to him anyway?—(Mr. Pinker): The man in the street might think so, but it is extraordinary the affection some of the worst of the men in prison have for their wives right to the last moment.

9446. (Sir Frederick Barrow): Do you consider that, if the right to obtain divorce on these grounds were given, it would tend to undermine the prisoner's faith in his wife, and also would materially affect any hope of reconciliation when he came out, or any hope of his reform?—I do.

9447. (Lady Bragg): Mr. Pinker, looking at the question entirely from the wife's point of view for the moment, do you think that it is always best that the wife should have the man back? I am thinking of a wife who does not want to take her husband back from prison because she is afraid that something violent will happen.—It is not easy for me to answer that question for the reason that I do lean quite frankly towards the prisoner. I do appreciate that one should consider the viewpoint of the wife and that she may be terrified of having her husband back. It is very difficult to generalise on a thing like that. You have to take a particular case and cite all the circumstances. She may still have an extraordinary affection for him and he may have the same for her despite all that has gone before.

9448. (Lord Walker): Mr. Allen, I would like to ask you about the distinction between imprisonment and preventive detention in England. If the man is put away for several years, would the fact that his sentence is in the form of imprisonment rather than preventive detention throw any light on the question of whether he had been previously convicted?—(Mr. Allen): Not of itself, no.

9449. Do statistics show, in the case of men who have been sentenced to seven years' imprisonment or more, in how many cases that is the first offence and in how many it is the culminating sentence in a long criminal record?—I have not any figures on the point and my opinion must be subjective, but the proportion of first offenders who get sentences of that length must be quite small. The population of Dartmoor at the moment is 644, of whom 633 are serving sentences of over three years. All of those men, practically without exception, are recidivists, men with previous convictions.

9450. And it is imprisonment they have been sentenced to, not detention?—Yes.

9451. (Chairman): Mr. Allen, is that not because recidivists are usually sent to Dartmoor?—Yes, but my point is that most men who get more than three years are recidivists.

9452. They do not get five or seven years for the first offence, as a rule?—No.

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9453. I suppose if it is a very serious first offence they may?—I think that the exceptions are in respect of sodomy and similar offences, and also embezzlement, where a person is caught for the first time but there may have been a great number of previous offences. The judge may pass a heavy sentence in these cases. They are the main categories in which a man may get a really long stretch on a first conviction.

9454. (Lord Walker): Would it be true to say that whereas the man who gets preventive detention has always some previous convictions, the man sentenced to long-term imprisonment generally has a good many previous convictions?—Yes.

9455. Would you accept this, that where a man gets preventive detention rather than imprisonment it is because the crime of which he has been convicted is relatively a minor crime?—I should hesitate to make such a generalisation.

9456. You said at the beginning of your evidence something to the effect that a man had to be convicted of a fairly serious offence in order to get a sentence of preventive detention. Are there many crimes in England in which the maximum sentence is two years' imprisonment?—Quite a number, yes.

9457. And where there is a conviction of such a crime, may the man be sentenced to a long term of preventive detention?—Yes, indeed.

9458. It amounts to his being sentenced on his record rather than his crime?—Yes, the Act itself says that where a person has all the necessary qualifications, if the court is satisfied that it is expedient for the protection of the public that he should be detained in custody for a substantial time, then it can pass a sentence of preventive detention. The emphasis is on "custody".

9459. The court may be limited in its powers in respect of certain offences. It cannot impose a sentence of more than, say, two years' imprisonment, but it can impose a sentence of preventive detention of up to fourteen years?—Quite so. If the man comes up before the court on such an offence he may get preventive detention, but on a more serious offence no one can say with certainty which he will get. It depends on the judge and not all judges take the same line.

9460. Are indictable offences in England in general defined by statute, and is the length of the sentence which may be imposed limited by statute?—That is the normal position.

9461. Mr. Hutchison, of the indictable offences of Scotland, would it be true to say there are relatively few statutory offences—they are nearly all common law offences?—(Mr. Hutchison): I do not speak as an expert but that is certainly my impression.

9462. The power of the court to impose imprisonment is unlimited?—That is so. I think it would be right to add one important type of case to those discussed a moment ago when reference was made to a long sentence of imprisonment for a first offence. If, owing to the operation of the doctrine of diminished responsibility in Scotland, someone charged with murder were found guilty of culpable homicide, there might very well then be a long term for a first offence—I think, speaking from memory, in one case a sentence of life imprisonment.

9463. (Mr. Young): Mr. Henston Brown, in those cases you spoke about where the wife has gone off with another man, can you tell me as a fact whether the other man with whom she went off was, or was not, a criminal?—(Mr. Henston Brown): I have no information on that.

9464. Have you any views, Mr. Pinker?—(Mr. Pinker): I would say that in many instances the man with whom she has gone off has a criminal record.

9465. Have you any idea of the proportion?—No, I have not.

9466. (Mr. Maddocks): Can you tell me how you decide which cases to take up? I suppose that you cannot deal with every prisoner who goes to prison for a long time.—We deal personally with all long-term imprisonment cases of four years and upwards and all preventive detention cases.

9467. Do you go to the wives in every case?—If there is a problem, yes; otherwise there is no need.

9468. The reason why I ask is because I have come across a number of cases where women whose husbands are in prison for a long time are seeking help and advice and they have never been contacted—if that is so, I would say that the husbands may have told us that everything was all right. We would not visit the wives automatically.

9469. (Mr. Moore): Mr. Henston Brown, I wonder if you could help me on the time factor. You have given instances of wives going off with other men; how soon after the conviction?—(Mr. Henston Brown): I cannot help you there; I have not the statistics.

9470. From your experience generally?—I have not that information.

9471. Can Mr. Pinker help me on that?—(Mr. Pinker): I would be guessing; I have not the facts.

9472. Can you say whether you have had a case of a loving wife supporting her husband for a time, and then finding another man?—I cannot cite a case.

9473. (Mr. Lawrence): Mr. Pinker, your Association, just as the Scottish counterpart, is engaged upon a work of great social importance, dealing with the peculiar social problem, the rehabilitation of criminals, of which there are very many. Accepting your point of view that the loyalty of a spouse is a potent factor in rehabilitating a criminal, if the civil law put into the hands of the spouse the weapon of divorce, do I take it from what you have said that you would expect to find your work made substantially more difficult?—Yes.

9474. I just want to put that to you: I have heard the argument that if the civil law reinforced in that penal way the criminal law, the criminal might be less likely to find himself the subject matter of attention by the criminal courts in a way which would land him with the sentence which would entitle his spouse to divorce him. Do you follow that?—Yes.

9475. What is your view then?—I should think that it is very doubtful whether a man really thinks, to that extent, of the consequences when he commits his offences.

9476. Do you find this, that what you are combating is the deterioration of character which very likely sets in in the case of a man who is the subject of a long sentence of imprisonment?—Yes.

9477. If, while he is the subject of that sentence, his wife is disloyal and goes off with another man, that is a matter, is it not, which lies, as it were, between him and her? But if, in addition to that, the civil law sanctioned the dissolution of the marriage at her instance, do you think that it would be likely to add to the deterioration of character which is an inevitable accompaniment of long-term sentences?—It might not in all cases but there are many cases where, I think, it would.

9478. It is a very difficult social problem from both angles?—It is.

9479. (Mrs. Jones-Roberts): Mr. Pinker, you draw a picture of a man sitting in his cell wondering what is going on outside and whether his wife might be taking steps to leave him. In the case of preventive detention, which is what I have in mind, that man would have served a number of sentences before. he would have sat in that cell, or some other cell, before and would have had a number of opportunities of considering where his course of conduct was leading him. His is also a case which has been before a judge who has had all the facts before him: including the record of the man, and that judge has decided that in this case society is better without that individual for a number of years?—Yes.

9480. We will assume that the wife has remonstrated with her husband a number of times and that she has now come to the end of her tether and is giving up hope. What advantage is there in keeping the woman tied to that man when she might perhaps have some chance of leading a more satisfactory life on her own?—The answer is the one I have given before, that there is always the possibility of rehabilitating the individual in the end. I have a lot of sympathy for the wife in her difficulty but she is the man's wife and there is the question of rehabilitation. I think that the man is more likely to respond if the wife remains loyal to him.

9481. I appreciate your loyalty to the man, Mr. Pinker, but you agree that there is another side?—I do.

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9482. (Mr. Justice Pearce): Mr. Allen, leaving aside as a matter for debate whether there ought to be any relief for the woman whose husband is a persistent criminal, do you think that it would be logical to say that, if relief in the shape of divorce is to be given, the ground of divorce should be either preventive detention or a sentence of five years' imprisonment in the case of a recidivist?—(Mr. Allen): I think the logic would lead you to the conclusion that sentences of imprisonment and preventive detention should be treated in much the same way, whether you draw the line at five years or seven years.

9483. Have you any figures to show how much hope there is of there being a permanent reform if the man is what may be called a "hardened criminal"?—I am afraid we have no figures which really give an accurate picture and would be helpful in this context. The criminal statistics are not very helpful, or have not been in the past, on this subject of recidivism—we are trying to correct that now. Preventive detention in its present form only started in 1948, and the minimum sentence is five years, so that it is in any event too early to say in the case of men sentenced to preventive detention.

9484. Mr. Hewitson Brown, I gathered from your evidence that your view is that the maintenance of family life may be a major factor in a prisoner's rehabilitation but that it is not always so?—(Mr. Hewitson Brown): Not always, no.

9485. Can you give me the proportion of cases in which you consider that the home life really is a major factor in the prisoner's rehabilitation—by rehabilitation meaning a serious rehabilitation with a good chance for the future?—No, I could not give you figures.

9486. Would it be anything like half the cases?—I would not like even to say that. There are all sorts of factors in rehabilitation; the promise of steady employment is a big factor in rehabilitation.

9487. Can you or Mr. Pinker help me about the class of case, which I am sure you must have met, in which a wife is trying to keep the children away from a husband with a prison record and is terrified that when the sentence ends the children will once again be subject to contamination which she may be unable to prevent?—(Mr. Pinker): The last case I can think of is one where the husband had been guilty of sexual offences against young children.

9488. I did not mean only that sort of contamination, but also contamination of dishonesty and kindred things?—I hesitate to reply to that. I know there have been cases where the wife has been frightened and has desired not to have her husband back because she feels that his influence might be bad on the children, but I could not cite actual cases.

9489. You have no idea of the proportion?—No, I have not.

9490. Can you give any impression of the proportion of cases in which the wife has really helped towards a really satisfactory rehabilitation?—I could not give you figures.

9491. They would not be a very high proportion, would they?—Yes, I think they would. I am guessing at this but it might be as high as forty per cent.

9492. You follow your cases up, do you?—We follow them up.

9493. Would you know what had happened to a case you dealt with five years ago?—Yes, we might easily know that, but not in every case; when a man has finished his license period, although he is encouraged to keep in touch with us, he does not always do so.

9494. Could it be said that sometimes a prisoner's expressions of affection for his family, when he is on trial or in prison, tend to exceed his performance when he is out?—I think that is possible. He tends to give expression to those feelings more, I think, under the special circumstances of imprisonment than he does outside; I think that may be so. I can also imagine that a certain type will use his feelings for his family as an inducement to get a lighter sentence.

9495. (Chairman): Thank you. Now we come to the question of murder as a ground for divorce. Mr. Allen, would you say what you wish to say about this matter?—(Mr. Allen): We do not think that the Home Office is in any special position to comment on the proposal that

a conviction for murder, followed by commutation of the death sentence to life imprisonment, should be made a ground for divorce. We can see the argument that once a person's life has become forfeit by law, the fact that mercy is subsequently shown to him by the exercise of the prerogative does not necessarily mean that his spouse should have to be tied to him, when he has been convicted of the supreme crime: we recognise that that would also apply to the young person under eighteen who is convicted of murder but cannot be sentenced to death, and similarly to the expectant mother who cannot be sentenced to death. But we had one or two points on the proposals; the first one was to emphasise the fact that life imprisonment does not mean imprisonment for life. There is no case on record in this century in which the Home Secretary has decided that a prisoner should be kept in prison for the whole of his natural life. The figures given by the Royal Commission on Capital Punishment show that the period of detention does vary quite a lot. Sometimes it can be quite short: the members of the Commission may have seen in the newspapers the other day that a convicted murderer was released after twelve months' detention. He had been convicted of the murder of an imbecile son in rather tragic circumstances, and the Home Secretary decided that twelve months' detention was enough. In this context we also have some figures (although I have not got them by me) about the subsequent record of released murderers, which show that on the whole it is unusual for them to engage in further crime—although there are exceptions to that.

The second point was that we were very uneasy about the proposition that persons found guilty but insane should be treated in the same way as persons found guilty and sentenced to death. The special verdict of guilty but insane is in law an acquittal and there is therefore no right of appeal to the Criminal Court of Appeal against the jury's decision. Our impression is that juries at present have considerable difficulty in settling the issue whether a man is insane on arraignment and unfit to plead. If they were aware that the question of divorce also turned on their decision I think it would not make the task of the jury any easier. Those are the main points we wanted to raise.

I should add, however, that it does not necessarily follow that where there has been a reprieve there must be some extenuating circumstances. There is a small number of cases where that is not so; that is where the physical condition of the convicted person would make it impossible to carry out the execution in a humane and decent manner. Those cases are very few and far between but they do arise from time to time and we thought we had better mention the point.

9496. I do not understand how such cases could arise. Can you give us an instance?—There was a case where the convicted man had lost his legs and would have had to be supported on the scaffold.

9497. Mr. Hutchison?—(Mr. Hutchison): Again, I agree generally with what Mr. Allen has said. I need not say anything about the special point he made on the verdict of guilty but insane because in Scotland a more logical description is in use, but I should like to underline one or two points.

In England, in the period 1946 to 1953, 133 persons were found "insane on arraignment" and 116 were found "guilty but insane". Over the same period, the number in Scotland found "unfit to plead" were 23, and the number found "insane at the time" was only 1, so that although one must beware of drawing erroneous inferences from very much smaller totals, the arbitrary nature of a distinction between these two categories, for what these figures are worth, is even more marked in Scotland than in England.

The second point I should like to underline is that the defence of diminished responsibility in Scotland may result in the conviction being for culpable homicide and not for murder. That, again, would introduce what might be thought to be a fortuitous difference, between Scotland and England, in the incidence of the proposals which are before the Commission.

9498. Mr. Pinker, what are your views on this?—(Mr. Pinker): They are the same as in the case of the other proposals. I do not myself draw a distinction in respect of murder—I know too many cases of men who have

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been reprieved and have made good. There is still the question of rehabilitation. As Mr. Allen has said, very few of them commit offences again.

9499. May we have your views, Miss Long?—(Miss Long): With women, murder would appear to be an incentive to marriage, not to divorce. Every woman who has been sentenced to death and reprieved has an enormous number of proposals of marriage almost automatically.

I have some figures of those sentenced between 1918 and 1950 who were released to our care. They do not include those who were found guilty but insane. The number is thirty-nine: single at the time of their conviction—twelve, all except three of whom have since married; widows, if I might call it, by Act of God—two; widowed by having murdered their husbands—three; divorced for adultery prior to their conviction—six; separated, having deserted their spouse or having been deserted prior to conviction—nine; charged with the husband, and the husband being hanged—one; the remaining six returned to their husbands on release and are still living with them.

Of those who were separated from their husbands prior to conviction, one was divorced after release on the ground of committed death sentence (which became a ground for divorce under an amendment to the law in Guernsey in 1946), but her husband could have divorced her because she had deserted him for more than three years before her conviction. I do not think there is anything else to say but that all those who have returned to their husbands have done extremely well.

9500. Mr. Hewitson Brown?—(Mr. Hewitson Brown): I find it a little more difficult to give an opinion in the case of murder, although logically I should take the same view as in the case of imprisonment. If the murderer is likely to be inside for a long time, I wonder why the wife should be tied to him or driven into a relationship with another man? On balance, and to be logical, I suggest that murder might be made a ground for divorce but excluding certain cases like that which Mr. Allen quoted—a woman who murders her child is in a somewhat different category.

I have notes of four recent cases. In one a married man formed a suicide pact with another man's wife, the woman died and this man was found guilty of murder and reprieved. He had three children and he was very fond of them. Meanwhile his wife divorced him for adultery. When he came out, he went back to his former wife and the three children, and they are going to re-marry quite soon.

Another murderer, who divorced his wife because of her infidelity while he was in prison, served eight years, I think, and now that he has come out he has married somebody else.

The third case is of a Pole, a married man who is longing to get back to his wife in Poland; she has kept up correspondence with him all the time he has been in prison. She hopes he will go back and set up house again.

The fourth man murdered someone while he was in the Army. His wife was going to leave him but we managed to effect a reconciliation and he is going back to her when he gets out.

So I am in a difficulty if I am to be logical; but, on the whole, I think that one must be logical and say that if a man serves a long term of imprisonment, whether for murder or some other crime, it ought to be ground for divorce.

9501. The difficulty is to provide legislation for that; you do not know, when a man is imprisoned during Her Majesty's pleasure, how long he is going to be imprisoned.—I would restrict the ground for divorce to imprisonment for a certain period of years.

9502. You might give a spouse the right to divorce the other spouse after he has spent a period of years in prison?—Yes, say three years or five years, three years being the desertion period.

9503. Mr. Allen, you rather suggested that even if divorce were granted for murder when the question of insanity did not arise, a verdict of "guilty but insane" ought not to be regarded as on the same footing. In the latter case, however, two things have been found,

first of all, that the deed was done, and secondly, that the man was insane when he did it. Looking at it from the point of view of the wife (assuming that the murderer is a man), has she not two reasons for divorce, firstly, that he has done this act, and secondly, that he is not responsible for his actions and, if he comes back to her, may commit murder again? Is there not something to be said for the view that there is as much reason for granting a divorce in the case of a verdict of "guilty but insane" as in a verdict of "guilty"?—(Mr. Allen): We are uneasy about the first part of that argument since although the court has said that he did the act, it has also said that he is not responsible. As regards the second part, we doubt whether it is right that the question of insanity should be settled for divorce purposes by the decision of a criminal court, and whether it is not better that this aspect of the matter should be dealt with under the ordinary law of insanity in relation to divorce. We quite appreciate that there may be cases in which, to put it frankly, a person is found "guilty but insane" who has never been, is not and never will be insane. Such persons are kept at Broadmoor pretty well on the same footing as a reprieved murderer is kept in prison, and much the same considerations apply in fixing the term for which they should be detained. We see that a difficulty does arise over these cases.

9504. But surely you cannot draw a distinction in a status between a person found "guilty but insane" when he was not insane, and a person found "guilty but insane" when he was insane?—But if the Medical Superintendent of Broadmoor says that he cannot certify the particular individual to be insane, it makes it impossible to obtain a divorce on the ground of insanity.

9505. Of course a man might have been found to be insane, under the M'Naghten rules, at the time when he did the deed, and yet not be "incapable of sound mind" for the purpose of divorce proceedings by his wife.—But if divorce proceedings cannot be taken on the ground of insanity, the individual is very much in the same position as the ordinary reprieved murderer serving a long term of imprisonment; he is detained for a long period.

9506. (Sir Russell Brain): Is it not true that there is a wide range of conditions covering persons found "guilty but insane"? The insane person may be suffering from an incurable mental disease and may remain at Broadmoor for the rest of his life. Another person may suffer from a temporary depression, may try to commit suicide and take her children with her, the children die, she survives, and she may get well soon and possibly be released in a few months. There are all sorts of conditions in between. The M'Naghten rules do cover a wide variety of forms of mental illness and there are, therefore, corresponding variations in the duration of detention and in the mental state of the individual on release?—Yes, though the M'Naghten rules are not so wide as the ordinary medical rules as to what constitutes insanity.

9507. (Lady Bragg): A wife may not be found to have any criminal responsibility for a murder committed by her husband, but I suppose that she might in some way be responsible for it and it might then be unfair that she should have a right to divorce on that ground?—You mean the case where the man is convicted of murder and the woman is not charged?

9508. Yes, perhaps he shields her.—I think we should be very reluctant to go behind any court proceedings, if the woman herself is not charged.

9509. Perhaps Mr. Pinker could comment?—(Mr. Pinker): I cannot cite a case just at the moment.

9510. (Mr. Selous): Do all persons found "guilty but insane" go to Broadmoor or to a similar institution?—(Mr. Allen): They are all detained as Broadmoor patients and most of them go to Broadmoor itself, but not all.

9511. Are there any statistics as to the length of the period during which they are detained?—I am not sure. The criminal statistics give particulars of the number of patients discharged in the course of each year and divide them up into various categories showing the length of detention, but I do not think that quite answers your question.

9512. The reason why I asked is that I gathered from a previous answer that not all the persons detained there are insane while they are detained there?—No.

7 December, 1954] Mr. P. ALLEN, C.B., Mr. N. J. P. HUTCHISON, REV. MARTIN W. PINKER,  
Miss H. L. LEONG and Mr. W. HENSTON BROWN, O.B.E.

[Continued]

9513. So that there would be some people for whom divorce on the ground of insanity would be available, and some people for whom it would not be available?—In the case of the latter category there is also the probability that they would be discharged in time.

9514. In time, but the time is quite uncertain?—Yes.

9515. (Chairman): Arising out of that, in the case of a person found "guilty but insane" I suppose the theory is that there is no real guilt at all because he was insane at the time when he did the deed. Suppose that the man or woman goes to Broadmoor and it is found that he or she is perfectly sane on arrival, theoretically there would be no reason for not letting him or her out at once? Is that done or is it not?—As we explained to the Royal Commission on Capital Punishment, in those cases we in effect treat the person in the same way as a reprieved murderer.

9516. (Lord Walker): The reprieved murderer is usually, is he not, a man with no criminal record?—I think that, by and large, the murderer is not a former criminal.

9517. (Mr. Mace): In the case of reprieved murderers, are there any statistics to show whether an element of sex is present in the crime? What I have in mind is that there may be a number of reprieved murderers in respect of whom the remedy of divorce on the ground of adultery would already be available.—There are no figures available at present. I am not sure whether we could get them out. I would like to look at that.

9518. Have you an impression as to how the figures might be? Sex does play a very large part in the case of reprieved murderers?—Yes, it is a fairly considerable proportion.

9519. (Chairman): Is it not usually the person whose spouse has been unfaithful who does the murder, rather than the other way round?—No.

9520. (Mr. Mace): May I ask a question, my Lord, on that? There is the case of the man who kills his wife's lover; he may be reprieved if there are other extenuating circumstances. Is that a common case?—(Mr. Fisher): It is by no means unusual.

9521. Then there is the case of a man having an illicit union with another woman who threatens to leave him and he kills her; is that another quite common case?—Yes.

9522. In those cases, of course, adultery is present, if the wronged spouse wishes to obtain a divorce?—Yes.

9523. (Chairman): My point was that in some cases the adulterer is not the murderer; it is the other spouse. (Mr. Mace): Yes, my Lord, that would be giving the wrongdoer power to benefit from the wrongdoing.—(Mr. Allen): In Table 4 on page 304 of the Report of the Royal Commission on Capital Punishment there is an analysis of victims showing the cases where the murder was of the mistress or lover, murder of sweetheart, murder of parents, murder of husband or of wife.

9524. (Mr. Lawrence): It is not unusual, is it, in these days to find cases where juries, if they are given the opportunity by the court, return a verdict of "guilty of manslaughter" rather than a verdict of "guilty of murder"?—There certainly are such cases, whether they have become more common or not we are not in a position to say.

9525. It has been said that a jury is reluctant to find a man or woman guilty of a capital offence where the circumstances are not accompanied by premeditation or brutality or something of that kind?—It has been said.

9526. The point I am making is that to some extent this question of whether divorce should be available for the spouse of the reprieved murderer is tied up with the question of whether divorce should be available where the other spouse is sentenced to long-term imprisonment, is it not?—I think it is linked, yes. The main difference between those people and the people we were discussing earlier is that the reprieved murderer is not usually a recidivist.

9527. The sort of case I have in mind is that of manslaughter where the jury sentences the man to five, seven or ten years of imprisonment.—Yes.

9528. (Chairman): We are all very much obliged to the witnesses for coming here to help us; you have been very helpful indeed.—(Mr. Hewson Brown): May I say that my evidence was given after consultation with the Chairman of the After-Care Council but not after consideration by the Council itself? I consulted the Chairman and got his views on the whole subject, but there was no time to bring the Council together to consider it.

9529. Then what you have told us are the personal views of the Secretary and the Chairman?—Yes. We are both agreed, but they are our personal views.

9530. Thank you very much. It is just as well we should know that; and your views, Mr. Pinker?—(Mr. Pinker): They are my personal views. The matter has not been before the Council.

(The witnesses withdrew.)

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